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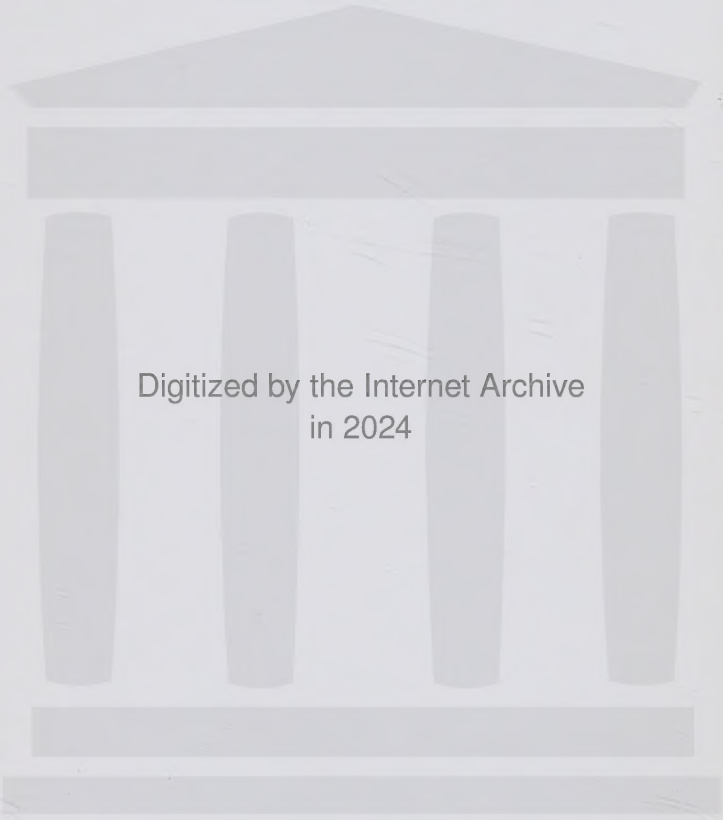

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1913.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

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1913.

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280	End of case.	*Appeal dismissed.*	*Appeal allowed.*

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DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

CLYDESDALE BANK, LIMITED *v.* SCHRÖDER & CO.

1911 *Oct.* 18; 1912 *May* 10.

Money received—Payment under Compulsion of Law—Legal Process in a Foreign Country—Action for Recovery of Money.

The rule that money paid under compulsion of legal process cannot be recovered back applies where the legal process is that of a foreign Court of law.

Action in the Commercial List tried by Bray J. without a jury.

The plaintiffs were the mortgagees of the sailing ship *Chelmsford* under and by virtue of a mortgage to secure account current dated and registered July 15, 1901, and granted by the owners of the ship. In June, 1908, the owners were indebted to the plaintiffs in a sum of over 16,000*l.* advanced under the mortgage. At that date the *Chelmsford* was on a voyage to Pisagua, in

1912

CLYDESDALE BANK, LIMITED v. SCHRÖDER & CO.

Chile, and the plaintiffs gave notice to the managers for the owners that they had resolved to enter into possession of the ship. She arrived at Pisagua on June 18 and the plaintiffs took possession. While the ship was still at Pisagua the defendants, who claimed as the agents for the Franklin National Bank of Philadelphia to be entitled to exercise a lien on the *Chelmsford* in respect of certain advances made by the bank to the owners and to the master of the ship, instituted proceedings in the Chilean Court and obtained an order for the arrest of the ship. Some correspondence then passed between the plaintiffs and the defendants, which is set out in the judgment, and on July 13 the plaintiffs, in order to obtain the release of the ship, paid the defendants the sum of 1650*l.* and a further sum which had been advanced to the master for disbursements, making in all 2452*l.* 10*s.*, but they stated that they did so under protest and that they reserved to themselves the right to open up the whole question in London. The ship was then released.

The plaintiffs claimed (1.) a declaration that the defendants had no lien on the ship and no right to arrest her, or to have their claims, if any, satisfied thereout in priority to the plaintiffs; (2.) judgment against the defendants for 1650*l.* and interest.

Evidence as to the Chilean law relating to the arrest of ships was given on behalf of the plaintiffs, the effect of which is stated in the judgment.

Bailhache, K.C., and *Raeburn*, for the plaintiffs.

Bateson, K.C., and *Leck*, for the defendants. The money claimed in this action was paid by the plaintiffs under compulsion of law and therefore it cannot be recovered back by them: *Moore* v. *Vestry of Fulham* (1); *Longridge* v. *Dorville.* (2)

Raeburn in reply. The money was not paid under compulsion of law, but on the terms of the plaintiffs' letter of July 13, and the defendants having accepted it on those terms held it as trustees for the plaintiffs: *Hirachand Punamchand* v. *Temple.* (3) In any case, however, there is no authority for saying that the principle as to payments made under compulsion of law being

(1) [1895] 1 Q. B. 399. (2) (1821) 5 B. & Ald. 117.
(3) [1911] 2 K. B. 330.

irrecoverable applies where the compulsion is that of a foreign Court of law. Further, the evidence shews that the plaintiffs would have had no locus standi in the proceedings in the Chilean Court, and if it be the fact that the plaintiffs had no opportunity of defending those proceedings the payment was made under duress and not under compulsion of law.

The following cases were also referred to:—*Holsworthy Urban Council* v. *Holsworthy Rural Council* (1); *Brisbane* v. *Dacres* (2); *Cadaval* v. *Collins* (3); *Fulham* v. *Down* (4): *Pitt* v. *Coomes* (5); *Green* v. *Duckett.* (6)

Cur. adv. vult.

May 10. BRAY J. In my opinion this action fails. The plaintiffs seek to recover a sum of money which they paid to the defendants under protest. The facts are as follows: The plaintiffs were the mortgagees of a ship called the *Chelmsford*. In June, 1908, the ship was about to arrive at a port in Chile, and the plaintiffs decided that on her arrival they would exercise their rights as mortgagees and take possession under their mortgage in order that they might be in a position to demand and receive the freight. The *Chelmsford* arrived at Pisagua in Chile on June 18, and the plaintiffs as mortgagees took possession of her. The defendants, or rather the Franklin National Bank, whose agents the defendants were, claimed that they were entitled to a lien on the ship and freight by virtue of a document given to them in connection with certain advances which they had made to the owners or to the master, and accordingly on July 10, the ship being still at Pisagua, the defendants instituted proceedings in the Chilean Courts for the detention of the ship. Whether an actual order was made by the Court for the arrest of the ship it is not necessary to decide; legal proceedings were undoubtedly commenced by the defendants, and they had previously given notice to the plaintiffs of their intention to take proceedings for the detention of the ship by virtue of their lien. In consequence of that notice the plaintiffs wrote to the defendants on July 9 as

(1) [1907] 2 Ch. 62.
(2) (1813) 5 Taunt. 143.
(3) (1836) 4 Ad. & E. 858.
(4) (1798) 6 Esp. 26 (n.).
(5) (1835) 2 Ad. & E. 459.
(6) (1883) 11 Q. B. D. 275.

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CLYDESDALE BANK, LIMITED v. SCHRÖDER & CO.

Bray J.

follows: "Your letter of 8th inst. to Messrs. J. Hardie & Co., of Glasgow, has been handed to us. From it we observe that your Valparaiso firm hold three captain's drafts amounting to 2452*l.* 10*s.* We are interested as mortgagees over this vessel, and recently foreclosed in virtue of the mortgage. We know very little how matters stand so far as outside liabilities are concerned, but in the circumstances are agreeable to give you a letter of guarantee to meet the three drafts referred to, provided we are satisfied that the same are on account of ship's disbursements. We would ask you therefore to cable to Valparaiso to release the ship, and when the accounts come home we can settle matters with your good selves in London." That was an offer made to enter into a contract, and it was not accepted. On July 11 the defendants, having communicated with the Franklin National Bank, wrote to the plaintiffs as follows:—"With reference to our lines of yesterday, we received this morning a cable from our friends in Philadelphia as follows:—'Your cable 10th received. 1650*l.* advanced owners October 31. Probably remitted captain, West Coast South America, for disbursements. 800*l.* advanced Sydney should have been all disbursements. Owner should be in a position to give full details. Do not release her without satisfactory security for payment of drafts,' which please note. We can only therefore cable out to our friends in Valparaiso to release the vessel on receiving your unconditional guarantee, covering the amount of the drafts plus interest, and also all cable and legal expenses incurred in the matter." It appears therefore that the defendants were not disposed to accept the plaintiffs' offer, and they made a counter offer. On July 13 the plaintiffs wrote a letter which I read as a refusal to accept the counter offer. They wrote: "We have your letter of the 11th inst., and regret you cannot see your way to meet us in the matter. In view of the position you take up, we enclose herewith bank draft in your favour 2452*l.* 10*s.*, receipt of which please acknowledge. We make this payment under protest, and reserve to ourselves the right to open up the whole question in London when the documents come home."

In my opinion this correspondence did not create any contract between the parties. Legal proceedings had been commenced,

and in order to obtain the release of the ship the plaintiffs paid the defendants under protest. It may be that if there had been no legal proceedings at all, and no threat of legal proceedings, the plaintiffs might have been able to recover the money back, if they could have shewn that the defendants were not entitled to it. But legal proceedings of some kind had been taken and the plaintiffs paid the money in order to get rid of those legal proceedings. The money was therefore paid under the compulsion of legal process.

It is quite clear on the authorities that if an action is brought in the English Courts against a person and he pays the claim, he cannot afterwards recover the money back although he may have said that he only paid under protest and that he reserved all his rights. If he desires to prove that he is not liable to pay the money, he must defend the action which has been brought for the very purpose of deciding whether the money is payable or not. He cannot by paying under protest reserve his right to raise the question of his liability in some subsequent proceedings. It has been contended on behalf of the plaintiffs that this principle does not apply when money has been paid under the compulsion of proceedings in a foreign Court of law. I agree that there is no authority on the point, but in my opinion there is no difference in principle for this purpose between proceedings in a foreign Court and proceedings in this country. I have no right to assume that legal proceedings in the Courts of a foreign country will not be properly conducted or that an improper result will be arrived at. If that were so, it would be very easy for a person who is sued in a foreign Court to avoid fighting the case there, for he could always pay under protest, and then if his opponent happened to be in England he could sue him here for the return of the money. The truth is the principle is the same in both cases. If a person is given an opportunity of contesting a claim in a Court of law, whether in this country or abroad, and if instead of doing so he pays the claim under protest, he cannot afterwards recover back the money. In both cases the money has been paid under compulsion of law.

It has been suggested that according to Chilean law the plaintiffs had no right to appear in the proceedings instituted by the

1912

CLYDESDALE BANK, LIMITED v. SCHRÖDER & CO.

Bray J.

defendants for the arrest of the ship, but there is no evidence that that is so, and I cannot assume that the Chilean law is so unjust that the Court will make an order in rem against a ship without allowing some one to appear on behalf of the ship to defend the proceedings. Then it was said that these proceedings were merely provisional, but I cannot believe that the Chilean Court would order the detention of a vessel without any ground for doing so, or that an application for its seizure would be granted without proof of any title on the part of the applicant. It was further stated by the witness for the plaintiffs that in the circumstances of this case and according to Chilean law the proceedings instituted by the defendants must have failed; if that is so the plaintiffs should have contested the case, for they would have been successful. I have no reason for supposing that the same remedy is not open to the owner of a ship which is arrested in Chile as in this country, and it seems to me that the proper course for the plaintiffs to have adopted was to have paid the necessary deposit and obtained leave to contest the claim. But however that may be, the plaintiffs paid this money under compulsion of law, and therefore they cannot now recover it back. The action therefore fails, and there must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Stibbard, Gibson & Co.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1913
Feb. 14.

MORPETH RURAL DISTRICT COUNCIL *v.* BULLOCKS HALL COLLIERY COMPANY, LIMITED.

Practice—Particulars—Extraordinary Traffic on Highway—Damage to Highway—Action to recover Extraordinary Expenses—Particulars of Average Expense of Highways in Neighbourhood—Particulars of Average Expense of the Highway damaged—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.

In an action brought by a highway authority to recover expense incurred by them in repairing a highway in their district which they alleged to have been damaged by extraordinary traffic conducted thereon by order of the defendants, which expense was alleged to be extraordinary, having regard to the average expense of similar highways in the neighbourhood :—

The Court of Appeal ordered the plaintiffs to deliver to the defendants the best particulars that they could of the average expense for the past five years of the similar highways in the neighbourhood, stating the cost of labour, the establishment charges, and the nature and amount and cost of materials, but refused to order the plaintiffs to deliver to the defendants particulars of the average expense for the past five years of the highway damaged, stating cost of labour, establishment charges, and the nature and amount and cost of materials.

Appeal from an order of Rowlatt J. at chambers, dismissing an appeal from the refusal of a Master to order the plaintiffs to deliver to the defendants certain particulars as after mentioned.

The action was brought by the plaintiffs, who were the highway authority for the rural district of Morpeth in the county of Northumberland, against the defendants, who were the owners of the Bullocks Hall Colliery in the same district, to recover 801*l.* as extraordinary expenses incurred by them in repairing a highway in their district known as Bullocks Hall Road.

Paragraphs 3 and 4 of the statement of claim were as follows: "3. By a certificate of their surveyor dated August 7, 1912, it appeared, and appears to the plaintiffs that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses amounting to the sum of 801*l.* have been incurred by the plaintiffs in repairing the highway in their district leading from Bullocks Hall Colliery to Chevington

C. A.
1913

MORPETH RURAL COUNCIL v. BULLOCKS HALL COLLIERY COMPANY, LIMITED.

Station, known as Bullocks Hall Road, by reason of the damage caused by excessive weight passing along the same, and extraordinary traffic thereon, and the plaintiffs say that such extraordinary expenses to the extent aforesaid have been in fact incurred by them as aforesaid by reason of such damage as aforesaid done since about the month of October, 1911, and that such weight and traffic have since the said month been conducted by or in consequence of the order of the defendants. 4. The said weight and traffic were so conducted as aforesaid in the conveyance of coal from the said colliery to Chevington Station by means of a steam traction engine with a trailer attached thereto."

The defendants took out a summons before a Master for an order that the plaintiffs should deliver to them "further and better particulars under paragraph 3 of their statement of claim (*a*) of the 'average expense' for the past five years [stating the cost of labour, the establishment charges, and the nature, and amount, and cost of materials], (*b*) of the 'highways in the neighbourhood,' (*c*) of the extraordinary expenses amounting to the sum of 801*l.*, shewing (1.) how the sum of 801*l.* is arrived at, (2.) the average expense of Bullocks Hall Road for the past five years, and stating the cost of labour, the establishment charges, and the nature, and amount, and cost of materials." The Master made an order for particulars as asked for, with the exceptions that he struck out of (*a*) the words above enclosed in brackets, and also struck out (*c*) 2, and refused to order particulars to be given of the matters thereby specified.

On appeal by the defendants against the refusal of the Master as aforesaid, Rowlatt J. affirmed the order of the Master.

Ernest Charles, for the defendants. Unless the order for particulars under head (*a*) contains the words which the Master and judge have struck out, it will be, practically, of little use to the defendants. The question is whether the expense incurred in repairing the particular highway is extraordinary having regard to the average expense of comparable highways in the neighbourhood. As the order now stands, it will be open to the plaintiffs merely to make an arithmetical division

of the total expenses of the repairs of the highways in the neighbourhood for the past five years, and give the result as the average expense of those repairs. This would give no sufficient information to the defendants. Such particulars would not shew whether or not there has been a betterment of the particular road, or an enhancement of the cost of labour or materials at the time when the expense alleged to be extraordinary was incurred. The person by whose order the extraordinary traffic is conducted on the particular highway is not responsible for the expense of betterment of that highway, unless repair was not possible without such betterment. The particulars asked for under (*c*) 2 are also necessary in regard to the question whether the expense is extraordinary. It cannot be ascertained whether the expense is extraordinary, or whether the highways in the neighbourhood are comparable with the particular highway, without the particulars asked for both with regard to the highways in the neighbourhood and the particular highway. The particulars of the average expense of the highways in the neighbourhood by themselves would be insufficient for the purpose. It would be impossible to make an effective comparison of the average expense of comparable highways in the neighbourhood with the expense incurred on the particular highway, so as to see whether the latter is extraordinary, unless particulars are given with regard to the same items and the same period in respect of both the particular highway and the highways in the neighbourhood. It might well be that the expense of the repair of the particular highway during the period of extraordinary traffic was as great as it was because during the preceding four years the highway authority had neglected to keep it in sufficient repair. In *Colchester Corporation* v. *Gepp* (1) it appeared that particulars had already been given of the average expense of repairing the particular road, and all that was there decided was that particulars must be given as asked for in that case with regard to the similar highways in the neighbourhood. There is nothing in that case to shew that the particulars asked for by the defendants ought not to be ordered.

Lowenthal, for the plaintiffs. Particulars such as those asked

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for by the defendants are quite unprecedented, and really it would be an impossibility, or at any rate a matter of the utmost difficulty, for the plaintiffs to give them. Particulars in such cases ought not, it is submitted, to go beyond those which were ordered to be given in *Colchester Corporation* v. *Gepp.* (1) The observations of Vaughan Williams L.J. and Buckley L.J. in *Billericay Rural Council* v. *Poplar Union* (2) upon the construction of the Highways and Locomotives (Amendment) Act, 1878, s. 23, shew that it was not intended by the Act that there should be such a comparison as the defendants seek to make between the expenses for the past five years of the particular highway damaged and those of the similar highways in the neighbourhood. The effect of the Act is that, for the purpose of determining whether the expense incurred is extraordinary, a comparison is to be made between the actual expense of repairing the particular highway after it has been damaged by the extraordinary traffic and the average expense of repairing comparable highways in the neighbourhood. In an action of this kind the plaintiffs have to shew, first, that there has been extraordinary traffic on the particular road which has occasioned damage to that road, and which was conducted by or in consequence of the defendants' order, secondly, the actual cost of repairing the particular road in respect of the period of extraordinary traffic, and, thirdly, the average expense of repairing comparable roads in the neighbourhood. If the expense incurred in repairing the particular road for the time when the extraordinary traffic was carried on is in excess of the average expense of similar roads in the neighbourhood, then the expense has been extraordinary.

[VAUGHAN WILLIAMS L.J. The point in *Billericay Rural Council* v. *Poplar Union* (3) was that no evidence had been given of the average expense of repairing comparable highways in the neighbourhood. We held that regard must be had to such expenses for the purpose of determining whether the expenses in respect of the particular highway were extraordinary. The decision in that case does not appear to determine the questions with which we have to deal in this case.]

(1) [1912] 1 K. B. 477.
(2) [1911] 2 K. B. 801, at pp. 810, 817.
(3) [1911] 2 K. B. 801.

By the Locomotives Act, 1898 (61 & 62 Vict. c. 29), s. 12, the proceedings for the recovery of extraordinary expenses must be commenced within twelve months of the time when the damage to the road was done. Therefore the comparison must be between the expense of the particular road within that period and the average expense of the highways in the neighbourhood. Any comparison of the expense of the particular road for a longer period with the average expense of the highways in the neighbourhood is excluded. The defendants have no right to impose upon the plaintiffs a comparison of the average expense of the particular highway and the average expense of the highways in the neighbourhood for the period of five years. The only particulars which the plaintiffs can be ordered to give are particulars of the plaintiffs' claim. They cannot be ordered to give particulars of matters which the defendants seek to set up by way of defence. The particulars asked for in respect of Bullocks Hall Road are not really particulars of the plaintiffs' claim, but appear to be particulars of matters upon which the defendants seek to found a defence, namely, that the exceptional expense incurred in respect of Bullocks Hall Road during the period in question has been the result, not of extraordinary traffic, but of neglect on the part of the plaintiffs to repair the road properly during the four previous years. In due course the defendants may be entitled to discovery and inspection of any entries in the plaintiffs' books and documents relating to the matters with regard to which they seek information, but they are not the subject of particulars.

Ernest Charles in reply. It would be practically impossible, or very difficult, for the defendants to ascertain such particulars as they require from an inspection of the plaintiffs' books, whereas the plaintiffs themselves could, from their own books, much more easily give with reasonable accuracy the particulars of the requisite matters.

VAUGHAN WILLIAMS L.J. Speaking for myself, I think that the system adopted in this country for enabling a party to a litigation to obtain proper disclosure of the materials upon which the opposite party will rely in support of his case is not altogether satisfactory. It is often very difficult for a plaintiff or a defendant, as the

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case may be, to get proper disclosure of the case of the other party. One would have thought that, in the case of a public body, whose interest in a litigation is not personal, and who are only concerned to protect public interests, one would have found greater frankness in the matter of such disclosure than one sometimes finds. In practice one frequently finds that a public body is able to delay such disclosure down to the time of trial. I do not say that in this case there has been any attempt to delay or resist such disclosure for any improper reason, or any reason which ought not to actuate a public body with a due sense of its responsibilities, but, really, in this case the matters with regard to which particulars are asked for are matters as to which no one can doubt that they will be very material, if they can be disclosed, or ascertained at the time of the trial. It is said, however, and, I think, correctly said, that the defendants are only entitled, according to the practice, to particulars of the plaintiffs' claim, and are not entitled as defendants to have particulars from the plaintiffs as to matters which are matters of defence: and, that being so, it is further said that the particulars asked for in this case under the head (*c*) 2 are, in substance, particulars of matter of defence rather than particulars of the plaintiffs' claim. I feel that difficulty. I am inclined to wish that we had a general power to compel public bodies to bring forward information of this kind, because there is to my mind a difference between the position of a public body and that of a private individual as regards these matters. On the whole, I have come to the conclusion with regard to the particulars asked for under head (*a*) of the average expenses of the highways in the neighbourhood, stating the cost of labour, the establishment charges, and the nature and amount and cost of materials, that those are, strictly speaking, particulars of the plaintiffs' claim; and, although there may be, as the plaintiffs' counsel has suggested, some difficulty in giving these particulars, for instance with regard to the establishment charges, owing to the form in which the plaintiffs' accounts are kept, still I think that such difficulties might fairly be met, and that the words which the Master struck out under this head should be restored, and the plaintiffs should be ordered to give these particulars. If there is any real difficulty

in dealing with them, the plaintiffs can point this out, and say that the particulars which they give are the best particulars that they can give, and, if there is any difficulty in doing that on the face of the particulars, there may be an application to the Court in the matter. Then, with regard to the particulars asked for under (*c*) 2, shewing the average expenses of Bullocks Hall Road for the past five years, and stating the cost of labour, the establishment charges, and the nature, and amount, and cost of materials, as I have already intimated, I find it difficult to say that these relate to the statement of claim. They seem to me rather to relate to matter of defence, and, under the circumstances, I think that we ought not to interfere with the decision of the learned judge at chambers as to those particulars. Speaking for myself, I wish to say that I do not understand it to be denied by the plaintiffs' counsel that inspection of the plaintiffs' books and documents, if kept in proper form, may disclose these very matters as to which particulars are desired by the defendants. If so, I do not really see why a public body should not give these particulars, which they could do with much less trouble, cost, and expenditure of time than would be imposed upon the defendants in obtaining them by discovery and inspection of the plaintiffs' books. I hope that no unnecessary difficulty will be put in the way of the defendants when they come to have this discovery, and that the plaintiffs will from what I have said recognize that I think that a public body, when the other party to a litigation with them is entitled to discovery of documents relating to a matter, ought to do their best to facilitate such discovery. I have no reason to doubt that the plaintiffs will do so in the present case.

KENNEDY L.J. I entirely concur in the judgment which has just been given, but I will add a word or two for myself on each point. As to the particulars asked for of the average expense of the highways in the neighbourhood, I do not understand the plaintiffs' counsel to dispute that some particulars must be given, but he objects to the degree of particularity of the particulars asked for under head (*a*). My brother Vaughan Williams has held that there should have been an order for those particulars

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on the footing that the order should be obeyed so far as it is possible for the plaintiffs, acting in good faith, to carry it out. I cannot help thinking that it would be possible sufficiently to carry out such an order, except, perhaps, that there might be a difficulty with regard to establishment charges, and, in a case, which, I think, is not uncommon, of the repair of the roads being done for the highway authority by a contractor at a lump sum per yard, the highway authority might not have the means of differentiating between cost of labour and material and such like items, and, therefore, could not give complete particulars of such matters. It is needless, however, to speculate as to how this may be in the present case. If the plaintiffs can give these particulars, the defendants are, I think, entitled to have them, inasmuch as they are particulars of the plaintiffs' claim. As to the particulars of the average expenses for the past five years of Bullocks Hall Road, I have had considerable doubt, but on the whole I agree with my brother Vaughan Williams in thinking that they appear to relate to matter of defence rather than to the plaintiffs' claim. The matters of which particulars are asked for may, however, be relevant to the action, so that, when the question of discovery arises, the books and documents relating to those matters in the possession or under the control of the plaintiffs must be disclosed to the defendants; and it might be that there would be occasion for further disclosure by way of interrogatories with regard to these matters, though I hope there will be no necessity for that, for I trust that upon discovery every facility will be given by the plaintiffs to the defendants to simplify the work of reference to items in regard to relevant matters in the plaintiffs' books. I come to this conclusion as to the particulars asked for in (*c*) 2 with some regret, for, though I feel bound to decide the matter according to the rules of practice, I think that, if it were open to us to take a broader view with regard to particulars, it might in a case like this save the expense of interrogatories and lengthy affidavits of documents. But, according to the practice, I think that the defendants are only entitled to particulars of the plaintiffs' claim. For these reasons I think that the order of the learned judge was right as to these last-mentioned particulars.

Lowenthal, for the plaintiffs, suggested that the order for the particulars which the plaintiffs were directed to give should in terms state that the plaintiffs should give the best particulars that they could. To this *E. Charles*, for the defendants, made no objection, and the order was directed to be drawn up accordingly.

Order varied.

Solicitors for plaintiffs: *Crossman, Prichard & Co., for Brumell & Sample, Newcastle-upon-Tyne.*

Solicitors for defendants: *King, Wigg & Brightman, for Clayton & Gibson, Newcastle-upon-Tyne.*

E. L.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

M. T. SHAW & CO., LIMITED *v.* HOLLAND AND ANOTHER.

Bill of Exchange—Indorser—Irregular Bill—Indorsement by Way of Security—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *ss.* 20, 55, 56.

It had been arranged between the plaintiffs and a company that the plaintiffs would supply goods to the company, to be paid for by bills of exchange accepted by the company, if the defendants, who were directors of the company, would indorse the bills by way of security for their payment. In a series of transactions thereafter entered into the course pursued in each case was as follows. The plaintiffs, for the price of goods supplied, drew a bill of exchange payable to their own order on the company, and, without indorsing it, sent it to the company, who returned it accepted by the company, with the defendants' signatures indorsed thereon. The plaintiffs then placed their signature on the back thereof below the signatures of the defendants. These bills were duly met. In the case of a subsequent bill the same course was pursued with regard to the drawing and acceptance of, and the indorsements on, the bill. This bill was not paid at maturity. In an action by the plaintiffs against the defendants on this last-mentioned bill, or, alternatively, as having guaranteed payment of it:—

Held, that the defendants were not liable as indorsers of the bill or as having incurred the liabilities of indorsers of the bill under s. 56 of the Bills of Exchange Act, 1882, and that they were not liable as on

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a contract of guarantee, since the provisions of s. 4 of the Statute of Frauds were not satisfied.

Jenkins & Sons v. *Coomber* [1898] 2 Q. B. 168, approved of.

Glenie v. *Smith* [1908] 1 K. B. 263, distinguished.

ACTION tried by Hamilton J. without a jury.

The statement of claim stated that the plaintiffs claimed against the defendants as indorsers of a bill of exchange for 400*l*., dated November 10, 1911, drawn by the plaintiffs upon and accepted by Lindsay, Neal & Co., Limited, payable four months after date to the plaintiffs' order, which bill was indorsed by the defendants, and was indorsed and duly presented for payment by the plaintiffs, and dishonoured, of which dishonour the defendants had notice. Alternatively, the plaintiffs claimed the like sum under a contract whereby the defendants agreed that, if the plaintiffs would accept payment from Lindsay, Neal & Co. for certain goods by bill of exchange instead of cash, the defendants would jointly and severally guarantee payment of the amount of the said bill.

The facts and arguments sufficiently appear from the judgment.

Colam, for the plaintiffs.

D. M. Kerly, for the defendant Holland.

H. M. Giveen, for the defendant Neal.

1912. May 10. HAMILTON J. This is an action brought in respect of a bill of exchange for 400*l*., drawn by the plaintiffs, and accepted by Lindsay, Neal & Co., Limited, for goods supplied to the acceptors by the plaintiffs, who now sue the defendants whose names appear upon the back of the bill. The defendants were at all material times directors and shareholders of the company. The action is brought by the plaintiffs, as holders, against the defendants, as indorsers, of a bill of exchange, or alternatively against the defendants as sureties for the payment of the bill, or alternatively again, although this way of putting it, if ever really raised, has been dropped, as having agreed to indemnify the plaintiffs against any risks they might run, or loss they might incur, by supplying goods to the company upon credit and bill of exchange instead of for cash.

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The facts are as follows. The bill fell due, was duly presented and dishonoured, and notice of dishonour was given to the defendants. Transactions between Lindsay, Neal & Co., Limited, and the plaintiffs were going on before May, 1909. On May 18, 1909, the plaintiffs wrote to the company as follows: "We quote you in every case our very lowest prices for cash, and we need the money ourselves to be promptly paid. We shall be glad to have your enquiries upon those terms. We may add that we would be willing to draw upon you at three months, instead of cash payments, subject to the drafts accepted by your company being indorsed personally by your present directors." This (which was not an offer to be accepted then and there, but an intimation of willingness which might be revoked, unless some further step was taken) was answered on May 19 by Lindsay, Neal & Co., Limited. It is true that the letter was signed by the defendant Holland, but only as director, and therefore it is not his personal letter at all. The answer is: "We may be glad to avail ourselves of your suggestion. We always appreciate your quoting us your lowest prices." Now that suggestion was that goods might be supplied on credit, if three months bills were given instead of cash and these bills were indorsed by way of guarantee by the two defendants personally. There appears then to have been a series of transactions, from December 10, 1909, to November 10, 1911, under which bills, to the number, I think, of twenty-three and totalling between 2000*l.* and 3000*l.*, were drawn for goods supplied by the plaintiffs upon Lindsay, Neal & Co., Limited. These bills (which were all met, no question having arisen) were brought into existence in this way. On the face of them they were in the form of bills of exchange payable to order of the plaintiffs. The plaintiffs signed them as drawers, and then they were sent to Lindsay, Neal & Co., Limited, and the company signed as acceptors, but before the plaintiffs ever indorsed them, and before the plaintiffs, therefore, ever ordered payment to anybody, either specially or generally, the two defendants wrote their names on the back of them. As I understand, the same course was thereafter followed with regard to the bill sued upon. In the present case the plaintiffs sent to Lindsay, Neal & Co. a draft in ordinary form "four months after date pay to our order

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400*l.*," and Lindsay, Neal & Co. accepted it. The two defendants, Holland and Neal, wrote their names upon the back, not at the top of the paper, but leaving room for other names above theirs. Then the plaintiffs, as in the other cases, wrote their names below that of Mr. Neal, and subsequently the plaintiffs endeavoured to collect the bill. There was a sequence of transactions in 1909, 1910, and 1911, in which the same course was pursued as in the present case. In addition, on November 17, 1911, when this particular draft was sent to Lindsay, Neal & Co., the plaintiffs wrote, "We beg to enclose our draft for 400*l.* drawn at four months date from the 10th instant, which please kindly accept, and indorse in the usual way," i.e., the way to which I have referred in connection with the previous bills, "on account of the current month's deliveries, and oblige, yours faithfully."

Now I might infer from the two original letters of 1909, which came to the knowledge of the two defendants, coupled with the fact that they signed, and assented to the company's paying this series of bills afterwards, an agreement in fact that, when goods were supplied on credit by the plaintiffs to Lindsay, Neal & Co., the two defendants would personally be sureties for payment of the price, and I think that in fact that is the proper inference to draw. I am also asked to infer that the two defendants authorized the plaintiffs to take any draft bearing their signatures and accepted by Lindsay, Neal & Co., and add whatever might be necessary to make it in all respects a regular and complete bill of exchange upon which they might sue Lindsay, Neal & Co. as acceptors and the defendants as indorsers. I do not think that I can infer any such authority. I can infer nothing more than a promise by the defendants, that, when bills of exchange were accepted in that form, they would do what they did in the present case, namely, write their names on the back in the way in which they have written them, which all the parties thought was binding and sufficient to secure payment for the goods. Further, assuming that an authority ought to be inferred as suggested, it is at the utmost an authority which has not been exercised by the plaintiffs, because the plaintiffs, instead of filling up the document like an ordinary

bill of exchange, filled it up so as to make it appear to be an irregular bill of exchange. I, therefore, do not think that I can draw any inference of fact which will assist the plaintiffs in their claim upon the bill of exchange as such.

The answer to the claim upon the promise to be sureties is that there is no memorandum in writing, signed by the parties to be charged, sufficient to satisfy the Statute of Frauds. The only signatures of the parties to be charged are those on the back of the bill. The defendant Neal signed no letter: the defendant Holland only signed a letter, not as a party to be charged, but as a director of Lindsay, Neal & Co. The signatures on the back of the bill do not purport to sign any agreement. Nor does the document within its four corners refer to any other document, and, without parol evidence, the plaintiffs could not connect this bill with any previous usual terms or any previous course of business. It seems to me therefore that there is no memorandum to satisfy the Statute of Frauds.

Then is this a bill upon which the plaintiffs can sue? Precisely such a bill existed in *Jenkins & Sons* v. *Coomber* (1), where the sequence of the names, and the circumstances under which the bill was signed, were precisely the same as in the present case. There does not appear to be any difference in the two cases, except that the party to be charged there was the father of the debtor, whereas here the parties to be charged are directors and shareholders of the company. There the bill was drawn by the drawers, and sent by them to the person who was to be acceptor of it; the person who was to indorse it then put his name on the bill; and it was sent back to the drawers both accepted and with the intended indorser's name on the back of it. Then the drawers also indorsed it, but unfortunately indorsed it, as has been done in the present case, below the name of the person whom they were suing as indorser. The decision in that case binds me, unless it can be distinguished or has been overruled. So far from having been overruled, it has been recognized as perfectly sound in a subsequent case in the Court of Appeal to which I will presently refer. In *Jenkins & Sons* v. *Coomber* (1) it was held, following *Steele* v. *M'Kinlay* (2), that the defendant

(1) [1898] 2 Q. B. 168. (2) (1880) 5 App. Cas 754.

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was not liable; that the document was not a regular bill of exchange, and was not put in suit by a holder in due course of a regular bill of exchange. The persons whose names appeared upon the back of the document were not indorsers in the ordinary sense of the law merchant, and therefore the right of the plaintiffs, if any, against the defendant was upon a contract of suretyship, as here, which failed for want of a memorandum to satisfy the Statute of Frauds. *Glenie* v. *Smith* (1) was a case somewhat similar to the present, but, unfortunately for the plaintiffs, it differs upon a material point. In that case the person who was intended to be the acceptor wrote his name across the face of a document, which was in blank except that it had a bill stamp upon it; the defendant, who was intended to be the indorser, put his name on the back; and the document was then handed to the person since deceased, whose legal personal representatives were suing, in order that he might, in pursuance of the agreement between the parties, complete it. The case, therefore, in terms came within s. 20, sub-s. 1, of the Bills of Exchange Act, 1882. Two signatures having been put on the blank stamped paper, it was delivered in order that it might be converted into a bill, and therefore operated as a prima facie authority to the person to whom the document was delivered to fill it up as a complete bill, of which he was to be the drawer and the two persons previously signing were to be acceptor and indorser respectively. Therefore s. 20 applied, and the bill was one upon which the plaintiffs could sue and recover. The Master of the Rolls, having rested his judgment, affirming that of A. T. Lawrence J. in the Court below, upon s. 20, said with reference to *Jenkins & Sons* v. *Coomber* (2), "that was a case in which s. 20 was not cited or referred to, either by counsel or the judge, and for a very good reason, namely that s. 20 could have no application because it was a case altogether outside that section." This decision also binds me, and I look to see the reason why *Jenkins & Sons* v. *Coomber* (2) was altogether outside that section, because, if that reason applies in the present case, I am bound to apply the decision in that case to the present. That case was outside the section, because, instead of being

(1) [1908] 1 K. B. 263. (2) [1898] 2 Q. B. 168.

a case where a simple signature was delivered in order to be converted into a bill, it was a case in which the drawers had drawn their draft in the usual form, and had then signed and sent it to the acceptor, and, on getting it back, instead of pursuing the actual authority to complete it by indorsing it themselves so as to indicate to whom it was payable by their order, put their names below the name of the defendant under the impression that they were thereby making it a complete and regular bill, which in fact they were not doing. That being the reason why s. 20 did not apply in *Jenkins & Sons* v. *Coomber* (1), I am also bound to say that it does not apply in the present case. *Jenkins & Sons* v. *Coomber* (1) is in point and is a complete answer to the plaintiffs' claim.

Judgment for defendants.

The plaintiffs appealed.

1913. Feb. 18. *J. R. Atkin, K.C.*, and *Colam, K.C.*, for the plaintiffs. By s. 56 of the Bills of Exchange Act, 1882, "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course." The defendants were liable either as indorsers of the bill, or, under s. 56 of the Bills of Exchange Act, 1882, as having incurred the liabilities of indorsers to the plaintiffs as holders in due course. In *Glenie* v. *Smith* (2), as in this case, the name of the drawer, to whose order the bill was payable, was, in the case of one of the bills sued upon, indorsed on the back of the bill below that of the defendant, who was sued as indorser, but it was held, nevertheless, that the defendant was liable. The decision of the Court of Appeal in that case does not appear to be consistent with the decision of the Divisional Court in *Jenkins & Sons* v. *Coomber*. (1) The Court of Appeal in *Glenie* v. *Smith* (2) distinguished that case from *Jenkins & Sons* v. *Coomber* (1) on the ground that s. 20 of the Bills of Exchange Act, 1882, applied in that case, but was not applicable in *Jenkins & Sons* v. *Coomber*. (1) Hamilton J. distinguished the present case from *Glenie* v. *Smith* (2)

(1) [1898] 2 Q. B. 168. (2) [1908] 1 K. B. 263.

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on the same ground. It is submitted, however, that s. 20 applies in this case. The bill, when sent back to the plaintiffs, was wanting in a material particular within the meaning of s. 20, sub-s. 1, of the Act, namely, the order of the drawers, and there was, therefore, under that section prima facie authority to complete it, using the signatures of the defendants as those of indorsers; and, therefore, according to *Glenie* v. *Smith* (1), the defendants are estopped from saying that their names were put upon the bill before the plaintiffs had made it a complete bill by their indorsement upon the back. If the plaintiffs' indorsement had been above the names of the defendants, no question could have arisen. It cannot, under the circumstances, matter in what order the signatures stand on the back of the bill. The ground of the decision in *Jenkins & Sons* v. *Coomber* (2) was that the Bills of Exchange Act, 1882, had not altered the law as laid down by the House of Lords in *Steele* v. *M'Kinlay* (3), and the case was, therefore, concluded by that decision. It is submitted that s. 56 of the Bills of Exchange Act, 1882, has the effect of altering the law as laid down in *Steele* v. *M'Kinlay.* (3) But there is a difference between that case and the present. There was, owing to the deaths of parties to the bill, no evidence in *Steele* v. *M'Kinlay* (3) dehors the instrument as to the intention with which the person whose legal personal representative was sued had put his name to the bill. It would appear from what was said in that case by Lord Watson (4) that evidence would be admissible in such a case as this as between the parties to the instrument to shew the relation in which it was intended they should stand to one another upon it. *Matthews* v. *Bloxsome* (5) is an authority in the plaintiffs' favour, and, apparently, it is not overruled by *Steele* v. *M'Kinlay.* (3) Lord Blackburn, certainly, in that case expressed a doubt whether *Matthews* v. *Bloxsome* (5) was good law, but he suggested that it might be distinguished by treating it as having been decided on the ground that, where there was clear evidence of what the intention of the parties was, the bill might be treated as between the parties as

(1) [1908] 1 K. B. 263.
(2) [1898] 2 Q. B. 168.
(3) 5 App. Cas. 754.
(4) 5 App. Cas. 778, 779.
(5) (1864) 33 L. J. (Q.B.) 209.

amended so as to be what it was intended to be. Here the circumstances shew that the intention of the parties was that as between them the bill should be treated as negotiated, and that the names of the defendants should be indorsed on the bill as indorsers for the purpose of guaranteeing the payment of it by the acceptors. If the plaintiffs had authority as against the defendants to indorse their name above the names of the defendants, the omission to do so is a mere technical error which may be amended at any time, even after action brought. The plaintiffs in this case were holders in due course of the bill. In *Lloyd's Bank Limited* v. *Cooke* (1) Fletcher Moulton L.J. expressed a clear opinion that any transfer of a bill or promissory note to a person in such a manner as to constitute him the holder of it is a negotiation of it within s. 31, sub-s. 1, of the Bills of Exchange Act, 1882, and consequently the delivery of such an instrument to a payee who has given value in good faith is such a negotiation of it as will constitute him a holder in due course of the instrument within the meaning of s. 29, sub-s. 1, and, therefore, that the plaintiffs in that case who were payees of the promissory note upon which the action was brought were holders in due course. If that view is right, then in this case, when the bill was sent back to the plaintiffs accepted, and indorsed by the defendants, and was indorsed by the plaintiffs, the plaintiffs became holders in due course, and the defendants were liable to them as indorsers under s. 56 of the Act, because, having signed the bill otherwise than as drawers or acceptors, they had thereby incurred the liabilities of an indorser to holders in due course.

[VAUGHAN WILLIAMS L.J. The opinion so expressed by Fletcher Moulton L.J. in *Lloyd's Bank Limited* v. *Cooke* (1) was not necessary for the decision of that case.

KENNEDY L.J. In that case the note, when taken by the plaintiffs, was on the face of it a complete and regular negotiable instrument.]

By s. 31, sub-s. 4, of the Bills of Exchange Act, 1882, "where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition

(1) [1907] 1 K. B. 794.

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acquires the right to have the indorsement of the transferor." The instrument in this case was within the meaning of s. 29 a complete and regular bill of exchange when it was accepted and returned by the acceptors to the drawers. The putting of the defendants' names on it could not make it irregular, and the drawers could have sued the acceptors on it, if not paid at maturity.

[VAUGHAN WILLIAMS L.J. If so, that would have been independent of the law merchant, or of its being negotiable. When the defendants purported to indorse the bill, it was not a negotiable instrument. This bill was not at any time indorsed by the drawers so as to be on the face of it a complete and regular negotiable instrument. No order indicating the payee of the bill had ever been given by the drawers.]

If the plaintiffs had indorsed their name above the names of the defendants, the bill would on the face of it have been regular; the circumstances shewed that the intention of the parties was that the defendants should be liable as indorsers according to what would then have been the tenor of the instrument, and the defendants would have been estopped from shewing that the indorsement of the plaintiffs had been subsequent to the indorsements of the defendants. The previous course of business between the parties, and the fact that many bills similar in all respects to this had under similar circumstances been given before, shewed that the intention of the parties to the instrument was that the bill should be treated as negotiated, and that the defendants should stand in the relation of indorsers of the bill to the plaintiffs, and, that being so, the fact that the plaintiffs' indorsement is below the indorsements of the defendants will not defeat that intention.

[KENNEDY L.J. Hamilton J. held that the inference from the previous transactions as against the defendants was only that they promised to indorse their names on the bill as in those transactions.]

The letters of May 18 and May 19, 1909, and the bills subsequently signed by the defendants in pursuance of those letters are sufficiently connected together to constitute a memorandum signed by the defendants, the parties to be charged, of a contract

to guarantee payment of the amount of this bill within the meaning of the Statute of Frauds. [They also cited *Wilkinson* v. *Unwin* (1); *Penny* v. *Innes* (2); *Macdonald* v. *Whitfield* (3); *Long* v. *Millar*. (4)]

Leck, K.C., and *D. M. Kerly*, for the defendant Holland.

[They were stopped on the question whether there was a sufficient memorandum of a contract by the defendants to guarantee payment of the amount of the bill within the Statute of Frauds.]

The plaintiffs have to make out that, upon the face of the bill, and such inferences as the law can draw therefrom, the defendants are liable to the plaintiffs upon the bill. They have to contend, notwithstanding what was laid down in *Steele* v. *M'Kinlay* (5), that persons who have signed as strangers to the bill, and not indorsers according to the law merchant, are liable to one of the original parties to it. They seek to do that under s. 20 and s. 56 of the Bills of Exchange Act, 1882.

Sect. 20 of the Bills of Exchange Act, 1882, upon which *Glenie* v. *Smith* (6) turned, has no application to the present case, which is not within that section. This is not a case in which a simple signature on a blank stamped paper or a bill wanting in some material particular within the meaning of that section was delivered to a person in order that it might be converted into a bill, or that the omitted matter might be supplied. The material particular contemplated in that section is such a matter as the date, or amount, or period of currency, of the bill. Here, when the bill came back to the plaintiffs it contained all such particulars. The indorsement of the drawer of the bill to whose order the bill is payable is not such a material particular as is contemplated by the section. Assuming, however, that authority existed in this case as against the defendants to supply the omission of such an indorsement, namely, to add such an indorsement above the signatures of the defendants so as to constitute a bill of exchange regular on the face of it, it was an authority which was never exercised. In *Glenie*

(1) (1881) 7 Q. B. D. 636.
(2) (1834) 1 C. M. & R. 439.
(3) (1883) 8 App. Cas. 733.
(4) (1879) 4 C. P. D. 450.
(5) 5 App. Cas. 754.
(6) [1908] 1 K. B. 263.

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v. *Smith* (1), apparently, no reference was made to the fact that in the case of one of the bills the name of the drawer was placed on the back of the bill below that of the defendant, and both the bills there seem to have been treated as regular in point of form. Hamilton J. held that in this case the only inference deducible from the previous course of business as against the defendants was that they promised to indorse their names on the bill as they had done before on other bills. Assuming that the plaintiffs were authorized by the defendants to indorse their name above those of the defendants so as to make the bill regular on its face, that must be done within a reasonable time, and cannot be done after action brought. It was held in *Jenkins & Sons* v. *Coomber* (2) that the law as laid down in *Steele* v. *M'Kinlay* (3) was not altered by the Bills of Exchange Act, 1882, and, if so, the defendants cannot be made liable on this bill. Sect. 56 of the Bills of Exchange Act, 1882, only renders the person signing the bill otherwise than as acceptor or drawer liable as an indorser to a holder in due course. The plaintiffs are not holders in due course. At the time when the bill was sent back accepted by the acceptors, and indorsed by the defendants, it was not a complete and regular bill on the face of it; it was not a negotiable instrument, the drawers having made no indorsement making it payable to bearer or to a special indorsee, and therefore it could not be negotiated within the meaning of s. 31, and certainly not so as to make the plaintiffs holders in due course under s. 29. Consequently the defendants are not liable either as indorsers, or as having incurred the liabilities of indorsers under s. 56 of the Bills of Exchange Act, 1882. A holder in due course must be a person to whom the bill has been negotiated. The issue of the bill is not a negotiation of it. This bill never was negotiated. Under s. 56 a stranger to the bill who signs it becomes liable to subsequent holders in due course, but not to original parties to the bill.

H. M. Giveen, for the defendant Neal.

J. R. Atkin, K.C., in reply.

Cur. adv. vult.

(1) [1908] 1 K. B. 263. (2) [1898] 2 Q. B. 168.
(3) 5 App. Cas. 754.

Feb. 28. VAUGHAN WILLIAMS L.J. read the following judgment. I think that the decision of Hamilton J. is right, and is right for the reasons which he gives. Mr. Atkin and Mr. Colam cited and relied upon the case of *Glenie* v. *Smith* (1), but, as pointed out by Hamilton J., that case was decided upon s. 20 of the Bills of Exchange Act, 1882, which has no application in the present case. It was further argued by them that the effect of the Bills of Exchange Act, 1882, is to overrule the case of *Steele* v. *M'Kinlay*. (2) It was not really argued but that *Steele* v. *M'Kinlay* (2), if unaffected by that Act, would be fatal to the present appeal. But I agree with the decision of Wills J. and Kennedy J. in *Jenkins & Sons* v. *Coomber* (3), that the principles laid down in *Steele* v. *M'Kinlay* (2) are not affected by the provisions of the Bills of Exchange Act, 1882.

The action is an action brought in respect of a bill of exchange against the defendants, whose names appear on the back of the bill, and who were at all material times directors of the company. The alternative claim charging the defendants as on a contract to indemnify the plaintiffs was dropped at the trial. Having regard to the circumstances of this case, which I think may be called a hard case, every one would wish to decide in favour of the plaintiffs, but of course one cannot do this, if so to decide would be inconsistent with the law. It may be that the plaintiffs might have made the order contemplated by the bill of exchange within a reasonable time after the so-called indorsement by the defendants. I have not to decide any such question, because no such order was effected before action brought. This bill was never really negotiated. This is not a case of a bill in which indorsements appear to be simply in wrong order; it is a case in which the bill was never negotiated. The only difficulty that occurs to my mind in this case is that it might be argued that there was a negotiation of this bill in such sense that the omission to indorse the name of the drawers was an omission to carry out the arrangement between Shaw & Co. and Holland and Neal respectively, which arrangement was that, in consideration that Shaw & Co. would supply Lindsay,

(1) [1908] 1 K. B. 263. (2) 5 App. Cas. 754.
(3) [1898] 2 Q. B. 168.

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Neal & Co. with certain goods ordered by them, the plaintiffs would agree to take payment for such goods in the shape of a bill at three months, drawn by the plaintiffs and accepted by the would-be purchasers Lindsay, Neal, & Co., and the defendants promised that, if the goods were supplied, and the plaintiffs made their order generally by open indorsement, and handed the bill to the defendants, they, the defendants, would return the bill to the plaintiffs. It is argued that as between these two parties the bill to order must be treated as negotiated, and that the place of the names on the back of the bill will not alter the rights of the parties under the agreement. But the case of *Jenkins & Sons* v. *Coomber* (1) seems in no material facts to differ from the present case, as was pointed out by Hamilton J., and I think was rightly decided.

The result is that this appeal must be dismissed.

FARWELL L.J. I entirely agree with the judgment delivered in the Court below by Hamilton J., and the reasons by which he has supported it, and I have nothing to add.

KENNEDY L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiffs: *King, Adams & Co.*
Solicitors for defendant Holland: *Ward, Perks & Terry.*
Solicitors for defendant Neal: *Langford & Redfern.*

(1) [1898] 2 Q. B. 168.

E. L.

[COURT OF CRIMINAL APPEAL.]

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March 10.

THE KING *v.* PALMER.

Homicide—Murder or Manslaughter—Provocation by Words—Parties engaged to be married—Confession by Woman of Immorality.

Although a confession of adultery by a wife to her husband, who in consequence kills her, may be such provocation as will entitle the jury in their discretion to find a verdict of manslaughter instead of murder, a similar confession of illicit intercourse by a woman who was not the prisoner's wife but only engaged to be married to him cannot, if he kills her in consequence, justify such a verdict.

APPLICATION to the Court of Criminal Appeal for leave to appeal against conviction.

The prisoner Edward Palmer was tried at the Bristol Assizes before Lord Coleridge J. for the murder of Ada James, a young woman with whom he had been keeping company for two or three years and to whom he was engaged to be married. Both the parties resided in Bristol. The prisoner had been away to Canada from February, 1912, to December, 1912, when he returned to Bristol. Late on the night of January 27, 1913, he met the deceased in a street called Mina Road and told her that he could not stick to his trade, which was that of a chair and couch frame maker, as he did not like it, and that he intended going to Canada again; whereupon the deceased, according to his statement, said that if he went away she would go on the town. He asked her if she really meant what she had said, and she replied "Yes, I have done it before, and I will do it again," and then took off her ring and threw it in his face. Thereupon he seized her and cut her throat with a razor which he had in his pocket. The judge in directing the jury told them that "no provocation by words, however opprobrious, in a case where a deadly weapon is used can, in law, reduce the crime from murder to manslaughter." The prisoner was convicted. He applied for leave to appeal on the ground of misdirection.

J. G. Trapnell, for the prisoner. The direction to the jury that where a deadly weapon is used mere words can never

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constitute sufficient provocation to reduce a homicide to manslaughter was wrong in law. No doubt, "As a general rule of law," as Blackburn J. said in directing the jury in *Reg.* v. *Rothwell* (1), "no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance if a husband suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before were thereupon to kill his wife, it might be manslaughter." And that ruling was followed by Bucknill J. in *Rex* v. *Jones*. (2) No distinction can be drawn between a confession of adultery by a wife and a confession of illicit relations with other men by a girl who was under engagement to marry the prisoner. It was for the jury to say whether under the circumstances the provocation was sufficient, and the judge led the jury to understand that they could not so find.

S. H. Emanuel and *R. G. McDonald*, for the prosecution, were not called upon.

The judgment of the COURT (Channell, Bray, and Lord Coleridge JJ.) was delivered by

CHANNELL J. The Court are of opinion that in this case there is no ground for giving leave to appeal. The ground on which that leave is sought is that the judge is alleged to have misdirected the jury on the question of the amount of provocation which is sufficient to entitle the jury to find a verdict of manslaughter. Though we think that he did not absolutely withdraw the question from the jury we are agreed that he so expressed himself that the jury could not consistently with a proper respect for his opinion find such a verdict. We are of opinion that there was no misdirection and that if the jury had found such a verdict they would have been wrong. The judge stated the rule in the old form, that words alone can never constitute sufficient provocation to reduce murder to manslaughter. It would perhaps have been more accurate in view of modern decisions if he had said that words cannot constitute sufficient provocation except in very special circumstances. But

(1) (1871) 12 Cox, C. C. 145. (2) (1908) 72 J. P. 215.

the only special circumstances which have been held sufficient for that purpose are where the words involved a confession of adultery. It is well-established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of manslaughter only and not of murder. That has been extended in *Reg.* v. *Rothwell* (1) and *Rex* v. *Jones* (2) to a sudden confession by a wife of past adultery, an extension which no doubt creates an exception to the general rule that provocation by words is not enough. The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in the position of being engaged to be married. Under those circumstances if the effect of the summing up was to leave the jury under the impression that they could not properly find a verdict of manslaughter we think that it was right.

Application dismissed.

Solicitor for applicant : *Registrar of Court of Criminal Appeal.*

Solicitor for Crown : *Director of Public Prosecutions.*

(1) 12 Cox, C. C. 145. (2) 72 J. P. 215.

J. F. C.

1913
March 4.

In the Matter of an Arbitration between KING and DUVEEN and Others.

Arbitration—Specific Question submitted to Arbitrator—Award—Error in Law—Application to set aside.

If a specific question is submitted to an arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law does not make the award bad on its face so as to permit of its being set aside.

Stimpson v. *Emmerson* (1847) 9 L. T. (O.S.) 199, and *Adams* v. *Great North of Scotland Ry. Co.* [1891] A. C. 31, followed.

Motion to set aside the award of an arbitrator.

By an agreement dated October 25, 1905, and made between Joseph Joel Duveen, thereinafter called the building owner, of the one part, and Henry James King, of 138, Piccadilly, in the county of London, thereinafter called the adjoining owner, of the other part, after reciting that the building owner was entitled to the site of premises known as Gloucester House, Piccadilly, and that the adjoining owner was entitled to the premises 138, Piccadilly, and that the building owner was desirous of erecting new buildings on the site of Gloucester House in accordance with certain plans which had been prepared by the building owner's architect and signed by the adjoining owner's architect, it was provided and agreed, inter alia, that the building owner should carry out his work in such a way as not to cause any undue interference with the interior of 138, Piccadilly, and should any damage occur either in the decorations or otherwise then the building owner must make good any damage at his own expense or pay such a sum to the adjoining owner for making good such damage as might be required by him or in the event of any dispute might be fixed by the arbitrator thereinafter mentioned, and if at any time within twelve calendar months after the completion of the building owner's new building any of the flues in the adjoining owner's buildings should emit smoke into any room, passage, or other place in which such flues might be in No. 138 then the building owner should upon demand do such works as might be necessary to cure such ill to the satisfaction of the adjoining owner.

The agreement further provided by clause 21 that any and every dispute, difference, or question which should at any time arise between the parties to the agreement should be referred to arbitration.

The erection of a new building on the site of Gloucester House having been completed, it was alleged by King that certain of the chimneys of 138, Piccadilly smoked, and thereupon the following submission to the arbitrator specified in the agreement was agreed upon by King and the executors of Duveen, who had died since the date of the agreement of October, 1905:— "Inasmuch as it is alleged that certain chimneys belonging to the premises 138, Piccadilly emit smoke and soot into certain rooms at certain times when the fires are alight and also at certain times soot is caused to fall down other flues into the respective rooms connected with such flues when fires are not lighted, whereby a nuisance is created, and the premises during these periods cannot be used in peace and pleasure by the occupier thereof, and inasmuch as the building owners acknowledged that they cannot suggest any further remedies for preventing what is now alleged to take place, and whereas it has now been decided by the owners of the respective properties that under clause 21 of the agreement the matter should be referred to you as arbitrator, it is now referred that you should decide and award, (*a*) which, if any, of the flues belonging to 138, Piccadilly emit smoke into any room passage or other place in 138, Piccadilly by reason of the erection of the new building adjoining thereto; (*b*) what works, if any, should be done with a view to cure such, if any, of the said flues as do emit smoke as aforesaid; (*c*) if such, if any, of the said flues as do emit smoke as aforesaid should continue to emit smoke after the completion of the works directed by you, if any, or if you should be of opinion that no works can usefully be done to cure such flues, then whether under the agreement of October 25, 1905, the executors of Sir Joseph Joel Duveen are liable to pay damages in respect thereof to Mr. Henry James King, and, if they are so liable, what damages should be paid; (*d*) as to the payment of the costs of and incidental to this reference." The submission further empowered the arbitrator to call for any additional

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KING AND DUVEEN, *In re.*

evidence that he might deem necessary and to require any experiments to be carried out that he might deem expedient, and (without prejudice to the right of either party to apply for a special case to be stated) to take counsel's opinion as he might think fit upon any question of law that might arise.

The arbitration was held and the arbitrator made an award in the following terms:—"(*a*) That certain of the flues belonging to 138 Piccadilly did emit smoke into certain rooms in that building and that this emission of smoke was in consequence of the erection of the new buildings adjoining thereto." These flues were enumerated in a schedule attached to the award and were the flues of seventeen rooms. "(*b*) That certain works the nature of which varies with the character and position of the various flues which emitted smoke should have been done with a view to cure the said flues and that these works have actually been carried out under my direction and superintendence as a result of which in the majority of the cases the defective flues have been cured; (*c*) that if certain of the flues after completion of the works directed by me do in certain conditions of weather and wind continue to emit smoke I am of opinion that no further works can usefully be done to cure such flues, but I am of opinion that under the agreement of October 25, 1905, the executors of Sir Joseph Joel Duveen are not liable to pay damages in respect thereof to Mr. Henry James King"; and (*d*) the arbitrator awarded that the costs of the arbitration should be paid by the executors.

King gave notice of motion to set aside the award on the ground (inter alia) that the arbitrator was wrong in law in holding that under the terms of the agreement of October 25, 1905, the respondents in the arbitration, the executors of Sir Joseph Joel Duveen, were not liable to pay damages in respect of the breach of the agreement.

George Wallace, K.C. (*Liversidge* with him), for the applicant. The award is bad on its face, for although the arbitrator has found facts which under the agreement entitle King to be paid damages, yet he has not awarded any damages. It is now well settled that an award which is bad on its face can be set aside.

In *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1) the Lord Chancellor said: "I am of opinion that the doctrine of *Hodgkinson* v. *Fernie* (2), to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land."

J. Sankey, K.C. (with him *J. Rolt* and *Hon. M. Macnaghten*), for the respondents. By the submission certain specific questions were left to the arbitrator, and by his award he has answered those questions. That being the case, his decision is final, even though it can be shewn to be erroneous in point of law. The *British Westinghouse Case* (3) is not in point, for there the submission to arbitration was a general one.

In *Stimpson* v. *Emmerson* (4) it was held by the Court of Common Pleas that if parties choose to refer a specific question of law to an arbitrator his decision upon the matter is final. That decision was referred to with approval by Lord Halsbury L.C. in *Adams* v. *Great North of Scotland Ry. Co.* (5) Further, where the parties are by the terms of the submission empowered to ask the arbitrator to state his award in the form of a special case, and do not avail themselves of the opportunity of doing so, the Court will not set the award aside: *London Dock Co.* v. *Shadwell.* (6) [He also contended that on the true construction of the agreement the arbitrator had not given a decision which was erroneous in law.]

George Wallace, K.C., in reply. The whole point of the decision in *Adams* v. *Great North of Scotland Ry. Co.* (7) was that the award was good on its face. As that case and also *Stimpson* v. *Emmerson* (4) were cited in the argument in the *British Westinghouse Case* (3) they cannot be regarded as authorities for the proposition contended for by the respondents.

CHANNELL J. In my opinion this motion must be dismissed. It is no doubt a well-established principle of law that if a mistake

(1) [1912] A. C. 673, at p. 686.
(2) (1857) 3 C. B. (N.S.) 189.
(3) [1912] A. C. 673.
(4) 9 L. T. (O.S.) 199.
(5) [1891] A. C. 31, at pp. 39, 40.
(6) (1862) 7 L. T. 381.
(7) [1891] A. C. 31.

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of law appears on the face of the award of an arbitrator, that makes the award bad, and it can be set aside. The decision of the House of Lords in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1), though that was in some respects a somewhat peculiar case, clearly shews that the general principle is as I have stated; but it is equally clear that if a specific question of law is submitted to an arbitrator for his decision, and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator. The case of *Stimpson* v. *Emmerson* (2) is a clear authority in favour of this view, and the question was also considered by Lord Halsbury L.C. in *Adams* v. *Great North of Scotland Ry. Co.* (3), where referring to *Stimpson* v. *Emmerson* (2) he said: "In the Court of Common Pleas, forty years ago, in a case in which the arbitrator had a question of law submitted to him according to the ordinary forms of pleading, the Court, having come to the conclusion that the decision of the arbitrator was, in the sense in which they understood the words, erroneous in deciding upon a question of law on demurrer, nevertheless held that, the parties having submitted that question to the arbitrator, it was for the arbitrator to determine it; in their own language, the parties had agreed to accept the arbitrator's decision upon the question of law, as well as his decision upon the facts."

I have some doubt whether the intention of the arbitrator in the case now before us was not really to decide the question as one of fact rather than of law. But however that may be, it cannot affect our decision on this motion, for the arbitrator has undoubtedly given his decision in the terms of the submission, and if his decision involves an erroneous construction of the agreement, the same words were used in the submission, and therefore that question of law was referred to him. He has either given an erroneous decision on a specific question of law which was referred to him, or he has decided a question of fact. In either case no grounds exist for setting aside the award.

(1) [1912] A. C. 673. (2) 9 L. T. (O.S.) 199.
(3) [1891] A. C. at pp. 39, 40.

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BRAY J. I am of the same opinion. The case is rather a peculiar one, because it is not often the case that parties refer a specific question of law to a lay arbitrator. Here they have done so, and therefore the rule as to setting aside an award which is bad on its face does not apply. The parties agreed to be bound by the decision of the arbitrator and they are bound by it, although it may be erroneous in law. That is the law as it was laid down in *Stimpson* v. *Emmerson* (1) and in *Adams* v. *Great North of Scotland Ry. Co.* (2) In holding that this award cannot be set aside we are in no way entrenching on the principle that an award which is bad on its face may be set aside.

Motion dismissed.

Solicitors for applicant: *Ingle, Holmes, Sons & Pott.*
Solicitors for respondents: *Vertue & Churcher.*

F. O. R.

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March 7.

LEWIS *v.* G. DAVIES. E. DAVIES, CLAIMANT.

Landlord and Tenant—Surrender of Tenancy—Tenant remaining in Possession —Execution—Claim by Landlord for Rent—8 Anne, c. 14, ss. 6, 7—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 160.

The defendant, who was the tenant of a farmhouse and land, agreed with his landlord to give up possession thereof on March 25, 1912. The defendant gave up possession of the land, but was permitted by the landlord to continue to occupy the house without paying rent until such time as the landlord should require him to give up possession of it. The defendant remained in the house and was occupying it on July 9, 1912, on which date certain goods in the house were taken in execution in satisfaction of a judgment recovered against the defendant in the county court. The landlord claimed under s. 160 of the County Courts Act, 1888, and ss. 6 and 7 of 8 Anne, c. 14, to be paid out of the proceeds of the execution rent which had become due on March 25 under the tenancy of the farmhouse and land:—

Held, that the defendant had not continued in possession of the house after March 25 under a new tenancy created by agreement, and that the claim for rent was good as against the execution creditor.

Nuttall v. *Staunton* (1825) 4 B. & C. 51, followed. *Wilkinson* v. *Peel* [1895] 1 Q. B. 516, distinguished.

APPEAL from the county court of Pembrokeshire holden at Narberth.

(1) 9 L. T. (O.S.) 199. (2) [1891] A. C. 31.

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LEWIS v. DAVIES.

The plaintiff having recovered judgment against the defendant in the county court, certain goods in a farmhouse occupied by the defendant were on July 9, 1912, taken in execution under the judgment.

The claimant claimed payment of 56*l.*, being one year's rent of the farmhouse and lands due March 25, 1912, out of the proceeds of the execution under s. 160 of the County Courts Act, 1888.

An interpleader issue was directed, on the hearing of which the following facts were proved. Up to March 25, 1912, the defendant had been the tenant of the claimant in his farmhouse and lands. On that date the defendant signed the following document, which was addressed to the claimant:—"I, George Davies, of Kings Park, Templeton in the parish of Narberth South, in the county of Pembroke, in consideration of your taking up the farm of Kings Park on the 25th of March, 1912, agree and hereby yield up possession of the dwelling-house, outbuildings and lands to you as and from the 25th of March, 1912. And it is hereby agreed that this surrender shall not operate to release or discharge me from the arrears of rent due up to the 25th of March, 1912, and owing to you." On the same date it was arranged verbally by the defendant and the claimant that the defendant should be at liberty to continue to occupy the house (but not the farm lands) without paying rent, but that the defendant was to vacate the house whenever the claimant should require it. The defendant remained in the house and was occupying it under this arrangement at the date of the execution.

The county court judge in giving judgment considered the cases of *Nuttall* v. *Staunton* (1) and *Wilkinson* v. *Peel* (2) and came to the conclusion that the case was governed by *Wilkinson* v. *Peel* (2); that on March 25, 1912, a new tenancy of the farmhouse, namely, a tenancy at will, was created; and that, therefore, the right to distrain after the expiration of a tenancy given by 1 Anne, c. 14, ss. 6 and 7 (3), did not apply. He accordingly held

(1) 4 B. & C. 51.

(2) [1895] 1 Q. B. 516.

(3) By 8 Anne, c. 14, s. 6, "And whereas tenants pur autre vie and lessees for years or at will frequently hold over the tenements to them demised, after the determination of such leases, and whereas after the

that the claim failed, and he gave judgment for the execution creditor.

The claimant appealed.

Hawke, for the claimant. In *Wilkinson* v. *Peel* (1) it was held by Lawrance and Kennedy JJ. that the right given by 8 Anne, c. 14, ss. 6 and 7, to distrain after the expiration of a tenancy does not apply where the tenant remains in possession of part of the demised premises under a new tenancy created by agreement. The Court in deciding that case distinguished *Nuttall* v. *Staunton* (2), the head-note of which states that "where a tenant by permission of the landlord remained in possession of a part of a farm after the expiration of the tenancy: Held, that the landlord might distrain on that part within six months after the expiration of the tenancy, the 8 Anne, c. 14, ss. 6 and 7 not being confined to a tortious holding over or to the holding of the whole farm." On the facts found by the county court judge this case falls within *Nuttall* v. *Staunton* (2) and not within *Peel* v. *Wilkinson* (1), and the county court judge was wrong in law in holding that there was such a new tenancy of the farmhouse created by the arrangement made on March 25, 1912, as deprived the landlord of the benefit of the statute of Anne. In both *Nuttall* v. *Staunton* (2) and the present case there was a holding over after the determination of the tenancy; it was not a tortious holding over, for the landlord consented to it, and therefore even if it created some sort of new tenancy it was not, according to the decision in *Nuttall* v. *Staunton* (2), such a new tenancy as deprived

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determination of such or any other leases no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof, it is hereby enacted that . . . . it shall and may be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives or for years, or at will, ended or determined, to distrain for such arrears after the determination of the said respective leases in the same manner as they might have done if such lease or leases had not been ended or determined."

Sect. 7: "Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

(1) [1895] 1 Q. B. 516.

(2) 4 B. & C. 51.

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the landlord of his right under the statute of Anne to distrain for rent due under the original tenancy. On the other hand in *Wilkinson* v. *Peel* (1) there was a new tenancy of a clear and definite character, and that is probably the ground of distinction between the two cases. On the facts here it is impossible to say that there was a definite new agreement for a tenancy of the farmhouse. The defendant's position was that of a man holding over whom the landlord did not trouble to turn out.

J. B. Matthews, for the execution creditor. The object of the statute of Anne was to protect landlords who without any fault of their own were on the conclusion of a tenancy deprived of the power of distraining for their rent. But there are dicta by various judges that the statute does not apply where the tenancy is determined by a forfeiture: *Grimwood* v. *Moss* (2), per Willes J.; *Doe* v. *Williams* (3), per Patteson J.; *Kirkland* v. *Briancourt* (4); the reason being that in the case of a forfeiture the tenancy is determined by the act of the landlord in electing to avail himself of the forfeiture, and therefore as the landlord can protect himself as regards arrears of rent the protection of the statute is not required. By a parity of reasoning the statute does not apply where, as here, the tenancy is determined by a surrender, for in that case also it is the act of the landlord in becoming a party to the surrender which determines the tenancy. The statute only applies where the tenancy expires by effluxion of time or after notice to quit. *Nuttall* v. *Staunton* (5) was decided on a demurrer, and the decision turned on the strict construction of the words "suffered and permitted" in the fourth plea, which involved a negative position on the part of the landlord giving rise at most to a tenancy at sufferance, whereas in *Wilkinson* v. *Peel* (1) there was a positive act by the landlord, namely, the creation of a new tenancy. In the present case the county court judge, having found as a fact that there was a surrender of all the premises comprised in the original tenancy, rightly held that the case was covered by *Wilkinson* v. *Peel* (1), because the subsequent possession of the farmhouse by the

(1) [1895] 1 Q. B. 516.
(2) (1872) L. R. 7 C. P. 360, at p. 365
(3) (1835) 7 C. & P. 322.
(4) (1890) 6 Times L. R. 441.
(5) 4 B. & C. 51.

defendant with the consent of the claimant was a possession by him in a new character, that is, as tenant at will.

Hawke replied.

CHANNELL J. The question in this case is whether the claimant, who had been the defendant's landlord, had a right to distrain on the defendant's goods for arrears of rent at a time when the goods had been taken in execution by the plaintiff under a county court judgment. The arguments have turned on the meaning and effect of the statute 8 Anne, c. 14, but the question really arises under s. 160 of the County Courts Act, 1888, which is substituted for the statute of Anne in cases where goods are seized under process of the county court and the landlord claims for rent. The language of s. 160 is not identical with that of the statute of Anne, but there is no real difference between the two, for although s. 160 is not in terms confined to cases where the landlord had a right to distrain at the time of the levy, it cannot have been intended that the mere fact of an execution being levied should give to the landlord a right of distress which he would not otherwise have had. It is, I think, quite clear that s. 160 assumes the existence of a right of distress which might have been exercised but for the fact that the tenant's goods had been taken in execution, and the object of the section is to prevent the landlord from being deprived of his right of distress by reason of the tenant's goods being in the custody of the law.

The question, therefore, which arises in this case is whether the claimant had under ss. 6 and 7 of the statute of Anne a right to distrain on July 9, 1912, for arrears of rent which had accrued due on March 25, 1912, under a tenancy which came to an end on that date. In my view our decision of that question must depend on the meaning to be given to the language of those two sections. We have been referred to two cases which have been decided on those sections, and at first sight it does not appear easy to reconcile them, but I think it is possible to distinguish between them; this much is clear at any rate, that the earlier decision was brought to the attention of the judges who decided the later case and they thought it could be distinguished

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and they did not intend to decide contrary to it. Before dealing with those two cases I will refer to the language of the Act. Sect. 6 begins by reciting that tenants frequently hold over after the determination of the tenancy and that no distress can be made for arrears of rent that became due before the determination, and then the section proceeds to enact as follows: "It shall and may be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives or for years or at will ended or determined, to distrain for such arrears after the determination of the said respective leases in the same manner as they might have done if such lease or leases had not been ended or determined." If the enactment had stopped there, it might have been contended that it applied to every case where a tenant remained in occupation, under whatever circumstances, after the determination of the tenancy. But s. 7 goes on to say "Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due," so that the distress is to be made, not merely whilst the tenant is actually in possession, but "during *the* possession," and I think, looking at the two cases referred to, that there may be a distinction between those two forms of expression. The earlier of the two cases was *Nuttall* v. *Staunton*. (1) The question there, it is true, arose on a demurrer, but it by no means follows that the decision does not lay down a valuable and important principle of law. It was an action of replevin for goods taken in certain premises on December 30, 1823, and there was an avowry by the defendant that the goods had been distrained for rent due on September 29, 1823, from a person who had been the defendant's tenant of the premises up to September 29. To this avowry the plaintiff pleaded several pleas in bar. The fourth plea alleged that after September 29 and before December 30 the defendant had retaken possession of the premises except as to a part in which the goods had been distrained "which defendant suffered and permitted" the tenant "to occupy for a certain time not elapsed at the time" when the

(1) 4 B. & C. 51.

goods had been distrained. The fifth plea alleged the same facts in different language, setting out the agreement between the defendant and the tenant. In support of the demurrer to the fourth plea it was contended by counsel in argument that "the fourth plea is bad, because it furnishes no answer to the avowry; for it admits that the tenant remained in possession by permission of the landlord." Then Bayley J. raised a question as to whether the statute of Anne applies unless the tenant remains in possession of the whole of the premises, and counsel referred to an authority on that point, and proceeded to argue that "it is, therefore, immaterial to this case, whether a new tenancy was created or not." It is quite clear, therefore, that the question of a new tenancy was before the Court. On the other side it was argued that the nature of the possession by the tenant at the time of the distress was shewn by the agreement set out in the fifth plea; and it was said that "it was thereby stipulated that the tenant should give up possession of the farm, which expression denotes the whole matter that he held as tenant. The subsequent occupation by him was merely of a particular part and for a limited purpose, and not as tenant. The statute 8 Anne, c. 14, does not apply to such a holding." The judgment of the Court was delivered by Abbott C.J., who said: "The fourth plea in bar raises two questions upon the construction of the statute 8 Anne, c. 14, ss. 6 and 7. First, whether the holding over by the tenant must be tortious; and secondly, whether it must be of the whole farm. I find nothing in the statute itself confining its operation to cases of a tortious holding over, or to a holding of the whole; and as it appears to have been made for the benefit of landlords, we must not narrow the construction, there being no plain words making that necessary." That is an express decision that the statute does apply to cases where the holding over is not tortious, and also where there is a holding over of part only of the premises. Then Abbott C.J. goes on to say: "The first avowry brings the landlord's right within the statute, and the fourth plea admits that the tenant remained in possession of a part of the premises; it therefore furnishes no answer." I understand that to mean that what is necessary in order to make the Act apply is that the tenant should have

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remained in possession, and that it is immaterial whether the landlord did or did not consent to his doing so. The judgment proceeds: "The fifth plea is bad for the same reason; for although it sets out the agreement and avers a performance, by giving up possession, yet it admits that the tenant continued in possession of part of the premises, and does not deny that the part of which possession was so retained was the place in which the distress was made." When one comes to compare that decision with the later case, *Wilkinson* v. *Peel* (1), the important points to bear in mind are that the judgment laid stress on the fact that "the tenant remained in possession" and "continued in possession" of a part of the premises, and that it was not considered to make any difference whether the holding over was tortious or not, or, in other words, whether the landlord did or did not consent to the tenant's remaining in possession. It is no doubt true that on the facts in *Nuttall* v. *Staunton* (2) it might have been contended that a new tenancy had been created, but the important thing about the decision is that the Court apparently did not hold it necessary to consider that question, but based their decision on the fact that the landlord had consented to the tenant remaining in possession, in continuance of a possession which had previously existed.

In *Wilkinson* v. *Peel* (1) there was no question in issue as to whether or not the possession was under a new tenancy, for both parties agreed that, before the expiration of the tenancy, a new tenancy was created of part of the premises and that the plaintiff was in possession under that new tenancy at the date when the defendants claimed to distrain for rent due under the old tenancy. The question was whether under the statute of Anne they had a right to do so. The case was heard by Lawrance and Kennedy JJ. It is quite clear that they did not intend to differ from *Nuttall* v. *Staunton* (2), for that case was referred to in the course of the arguments, and Kennedy J. said in delivering judgment: "Looking at the statute of Anne, and at the language used in the cases which have been referred to—none of which are precisely in point—I am of opinion that the statute does not apply to a case where, before the determination of the old tenancy, an

(1) [1895] 1 Q. B. 516. (2) 4 B. & C. 51.

agreement is entered into between the landlord and the tenant whereby a new tenancy is created, because in that case the tenant does not continue in possession after the expiration of the old tenancy, but commences to hold under the new tenancy. I think the words in s. 7 of 8 Anne, c. 14, 'during the possession of the tenant' mean 'while he continues in possession.'" I think Kennedy J. must have got those last words from *Nuttall* v. *Staunton*. (1) "Of course, in one sense, the tenant continued in possession of these four fields; but the possession was under a new right and a new title created by the agreement with the defendants."

I think that the distinction between the two cases, though I admit it is a somewhat fine one, is that if there is some act or agreement which creates a new title in the tenant the statute of Anne does not apply, but if there is a mere continuation of the possession which began under a tenancy which has determined, the fact that the continuance in possession was not tortious, because the landlord assented to it, does not prevent the statute from applying. Whether the holding over is tortious or with the assent of the landlord the statute applies, unless the possession is under some definite new title as was the case in *Wilkinson* v. *Peel*. (2) Where before the expiration of the old tenancy a new tenancy is agreed upon there is really no period of time during which there is anything which can be called a continuation of "the possession" within the meaning of s. 7, for immediately on the determination of the old tenancy the tenant commences to occupy under the new tenancy.

The question which we have to decide is, within which category does the present case come? I have had considerable doubt whether the question is one of fact or of law. The county court judge considered both *Nuttall* v. *Staunton* (1) and *Wilkinson* v. *Peel*. (2) There was no real dispute as to the facts, and when the county court judge held that a new tenancy had been created I think he meant that he was bound so to hold as a matter of law by reason of the decision in *Wilkinson* v. *Peel*. (2) I do not think he intended to find anything as a fact beyond the evidence which is on his note, and I

(1) 4 B. & C. 51. (2) [1895] 1 Q. B. 516.

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find in the note a statement that the defendant remained in the house but that he was to give up possession whenever the landlord should require it for a new tenant. I do not think that on the evidence it can be said as a matter of law that there was an agreement by which a new right and a new title were created in the sense indicated by Kennedy J. in *Wilkinson* v. *Peel.* (1) I think that the facts shew that the defendant merely remained in possession with the consent of the landlord within the meaning of the judgment of Abbott C.J. in *Nuttall* v. *Staunton* (2), and that the case is within that decision and not within *Wilkinson* v. *Peel.* (1) I do not desire in any way to question the authority of the dicta, to which we have been referred, that the statute of Anne does not apply where a tenancy has been determined by forfeiture. There does not appear to be any authority as to a determination by surrender, and speaking for myself I do not see why the fact that a tenancy has been determined by surrender should prevent it from having been "ended or determined" within s. 6 of the statute of Anne.

For these reasons I am of opinion that this appeal ought to be allowed.

BRAY J. I am of the same opinion. My brother Channell has dealt so clearly with the points raised by this appeal that I do not desire to add anything. I agree entirely with everything that he has said.

Appeal allowed.

Solicitors for claimant: *Holt, Beever & Crowdy, for Lascelles & Lewis, Narberth.*

Solicitors for execution creditor: *G. L. Matthews & Co., for Lewis & James, Narberth.*

(1) [1895] 1 Q. B. 516. (2) 4 B. & C. 51.

F. O. R.

[IN THE COURT OF APPEAL.]

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Jan. 16, 17.

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Guarantee—Indemnity—Oral "promise to answer for the debt of another"—Guarantee of Debt of a Company—Debenture of Company held by Guarantor—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

The mere fact that a person, who guarantees payment of a debt due from a company, is induced to do so by reason of his having a floating charge on the assets and business of the company will not take the case out of the 4th section of the Statute of Frauds.

The defendant in an action counterclaimed upon a promise by the plaintiff to be answerable for the price of goods supplied by the defendant to a limited company. The plaintiff was the holder of a large number of shares in and had lent money to the company, as security for which money he held a debenture of the company, which was a "floating" security on their business and assets. The defendant had been in the habit of supplying goods to the company for the purposes of their business. A balance being due to him in respect of goods so supplied, he was threatening, unless this was paid, not to supply any more goods to the company. Thereupon the plaintiff made an oral agreement with the defendant, the effect of which the jury found to be that he agreed to be answerable for the price of goods supplied to the company by the defendant, if the company made default. The jury further found that the plaintiff was induced to enter into the agreement by the fact, inter alia, that he had a debenture charge upon the assets of the company:—

Held (reversing the judgment of Lord Coleridge J.), upon the above facts, that the agreement was a guarantee which came within s. 4 of the Statute of Frauds, and, therefore, the agreement not being in writing, and there being no memorandum of it in writing, signed by the party to be charged, the counter-claim failed.

Dicta in *Harburg India Rubber Comb Co.* v. *Martin* [1902] 1 K. B. 778, discussed.

Appeal by the plaintiff from the judgment of Lord Coleridge J., in favour of the defendant, on a counter-claim in an action tried before the learned judge with a jury.

The action was for the price of goods sold and delivered by the plaintiff to the defendant. No question arose in the appeal upon the plaintiff's claim. The counter-claim (in substance) alleged a promise by the plaintiff to guarantee payment for goods sold and delivered by the defendant to a joint stock company, and claimed a balance due and unpaid for the price of such

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goods. The plaintiff in reply to the counter-claim pleaded the Statute of Frauds, s. 4.

It appeared from the evidence that the plaintiff held a large number of shares in the above-mentioned company, and had lent to the company the sum of 3000*l.*, as security for which the company had granted a debenture to one Leman, as nominee of, and who held the debenture in trust for, the plaintiff. This debenture was what is known as a "floating" security by which the company charged with payment of the moneys secured all its property present and future, including its uncalled capital. Under it the principal moneys secured were to become forthwith payable, (*a*) if the company should make default in payment on demand of the principal moneys in accordance with notice in that behalf, or should make default for a period of fourteen days in payment of the interest secured by the debenture, or (*b*) if execution or distraint was issued against or levied upon the property of the company, or (*c*) upon a breach of any of the covenants by the company contained in the debenture, or (*d*) at the option of the debenture-holder, if by the certificate of the auditor of the company, or any auditor, accountant, or solicitor appointed by the debenture-holder, it should appear that the company was carrying on business at a loss, or (*e*) if the company should go into liquidation whether voluntary or in accordance with an order of the Court. Upon the happening of any of these events power was given to the debenture-holder to appoint a receiver of all or any part of the property of the company thereby charged in the same manner as if he were a mortgagee within the meaning of the Conveyancing Acts, and had become entitled to exercise the power of sale thereby, or by one of such Acts, conferred, and any receiver so appointed was to have all the powers conferred by those Acts, or either of them, as if he had been appointed receiver in pursuance thereof, and in addition power, inter alia, to take immediate possession of the property of the company, and to carry on the business of the company.

The defendant had been in the habit of supplying goods to the company for the purposes of their business. In May, 1911, a balance for the price of goods so supplied was owing from the

company to the defendant, and the defendant was threatening not to supply any more goods to the company unless this balance was paid. There was evidence that on or about May 26 conversations took place between the plaintiff and the defendant as to the plaintiff's making himself responsible for payment for goods already supplied and to be supplied by the defendant to the company, with regard to the effect of which conversations the learned judge left, in substance, the following question to the jury: "Was there on or about May 26, 1911, an agreement between the plaintiff and defendant that the plaintiff would pay the debt of the company, if the said company made default, or did the plaintiff promise to pay the debt of the said company in any event?" The jury answered that the plaintiff promised to pay, if the company made default. The learned judge left this further question to the jury: "Was the plaintiff induced to enter into the agreement by the fact (inter alia) that he had a debenture charge upon the assets of the said company?" The jury answered this question in the affirmative. Upon further consideration the learned judge was of opinion that it was deducible from the judgments in *Harburg India Rubber Comb Co.* v. *Martin* (1) that, upon the findings of the jury, if the plaintiff had been the legal owner of the before-mentioned debenture of the company, the case would not have been within s. 4 of the Statute of Frauds, and, that being so, that it made no difference that his title to the debenture was only equitable. Upon the findings of the jury, therefore, he held that the case was excluded from the operation of the statute, and accordingly he gave judgment for the defendant on the counter-claim.

The Hon. M. M. Macnaghten, for the plaintiff. The learned judge in the Court below acted on what he supposed to be an expression of opinion by Stirling L.J. in *Harburg India Rubber Comb Co.* v. *Martin* (2) to the effect that, if in that case the defendant had had a legal interest by way of charge such as is given by the debenture in the present case, the Statute of Frauds would not have applied. This was, it is submitted, a misapprehension. It is true that the learned Lord Justice did in his judgment point

(1) [1902] 1 K. B. 778. (2) Ibid. at p. 791.

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out that the defendant in that case had no interest which the law recognizes in the property about to be seized, so that no question could arise as to what would be the effect of his having such an interest, but he really said nothing which imports an opinion that, if a guarantee were given with the motive of protecting such an interest as the plaintiff had under his debenture, the case would be taken out of the statute. The general effect of the judgments in *Harburg India Rubber Comb Co.* v. *Martin* (1) is in truth entirely adverse to the defendant in the present case. This is, upon the finding of the jury, the case of a simple guarantee given for the debt of another for good consideration, namely, forbearance, and a further supply of goods to the company guaranteed, and is therefore within the statute. There is no case in which a simple contract of guarantee has been held to be outside the statute because the motive of the guarantor in making it was the protection of what he supposed to be his own interest. There are cases, no doubt, in which an obligation to pay the debt of another arises incidentally to some larger or main contract antecedently made between the party liable to that obligation and the creditor; as in the case of a del credere agent: see *Couturier* v. *Hastie* (2); or as in the case of a contract between brokers on the Stock Exchange and a person who was to introduce customers to them that he should share the commissions earned, and any loss which might be incurred, by them, in respect of transactions with such customers: see *Sutton & Co.* v. *Grey*. (3) There is no analogy between such cases as those and the present case. There is no such larger or main contract here to which the guarantee is incidental. Neither is there any analogy to cases in which the promise to be answerable for the debt of another was an incident of an independent contract for discharge of a lien or charge upon property which the promisor was purchasing, or in which he had a legal interest. The plaintiff in the present case was under no liability or obligation to the defendant except that which might arise from the guarantee, and the defendant was not forgoing any right which he had over property in which the plaintiff was interested. It would

(1) [1902] 1 K. B. 778.
(2) (1852) 8 Ex. 40.
(3) [1894] 1 Q. B. 285.

obviously be going too far to say that, wherever a guarantor gives the guarantee in furtherance of his own interests, the case is not within the statute. [He also cited *Mallet* v. *Bateman* (1); *Thomas* v. *Williams* (2); notes to *Forth* v. *Stanton*, 1 Williams' Saunders, 211e.]

Hugo Young, K.C., and *Herbert Jacobs*, for the defendant. The judgment of the learned judge was right upon the principles to be deduced from *Harburg India Rubber Comb Co.* v. *Martin* (3) and other cases such as *Sutton & Co.* v. *Grey*. (4) The cases shew that, if a person promises to be answerable for the debt of another person as part of a contract the main object of which is the protection of a legal interest which the promisor has in property, the case is not within the statute. Here the plaintiff had such an interest in the company's business and assets under the debenture; and the jury have in effect found that the plaintiff entered into the agreement with the object of protecting his debenture charge upon the assets of the company. It was essential to the value of that charge that the business of the company should be carried on, and that it should continue to be a going concern, which would not have been the case, unless the defendant had forborne to sue for the price of the goods already supplied to it and continued to supply it with goods. The continued supply of goods by the defendant would have the effect of feeding the plaintiff's debenture. In effect the main object of the contract was that the defendant should supply goods to support the plaintiff's security and in return the plaintiff should make himself answerable for payment for the goods. In *Harburg India Rubber Comb Co.* v. *Martin* (5) Stirling L.J. said: "Both in the judgment of Cockburn C.J. in *Fitzgerald* v. *Dressler* (6) and in the judgment of Lord Esher M.R. in *Sutton & Co.* v. *Grey* (4) the word 'interest' means some species of interest which the law recognizes. In the present case the defendant had no such interest in the property which was about to be seized by the sheriff. He was a director of the syndicate

(1) (1864) 16 C. B. (N.S.) 530; (1865) L. R. 1 C. P. 163.
(2) (1830) 10 B. & C. 664.
(3) [1902] 1 K. B. 778.
(4) [1894] 1 Q. B. 285.
(5) [1902] 1 K. B. 778, 791.
(6) (1859) 7 C. B. (N.S.) 374.

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who had, no doubt, a deep interest, in the popular sense of the word, in its proceedings. He held a large number of shares. I believe he was the largest shareholder in the syndicate. He had also financed the syndicate, but he had nothing in the nature of a charge on their property." In *Sutton & Co.* v. *Grey* (1) Lord Esher M.R. said, with reference to the question whether a contract was a guarantee within the Statute of Frauds or a contract of indemnity: "Whether any contract is the one or the other is often a very nice question. But certain tests have been laid down to guide the Court in determining under which head any particular contract comes. The principal case in English law which affords such a guide is *Couturier* v. *Hastie*. (2) In that case a test was given by Parke B., who delivered the judgment of himself and Alderson B. (from whom Pollock C.B. differed as to the construction of the contract). The learned judge said (at p. 55): 'The other and only remaining point is, whether the defendants are responsible by reason of their charging a del credere commission, though they have not guaranteed by writing signed by themselves. We think they are. Doubtless, if they had for a percentage guaranteed the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale' (I would read that 'totally unconnected with the transaction'), 'they would not be liable without a note in writing signed by them; but being the agents to negotiate the sale' (that is, as I read it, 'being connected with the transaction') 'the commission is paid in respect of that employment: a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all questions whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them: and, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given.' There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or

(1) [1894] 1 Q. B. at p. 287. (2) 8 Ex. 40.

in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee: if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and s. 4 does not apply"; and further on Lord Esher says "the contract is not a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee; it is an indemnity with regard to a transaction in which the defendant has an interest equally with the plaintiffs." In the present case the plaintiff was not totally unconnected with the transaction, but was to derive some benefit from it, the object of it being to protect his interest under his debenture, and the contract was not a guarantee with regard to a matter in which the plaintiff had no interest except by virtue of the guarantee; it was an indemnity with regard to a transaction in which the plaintiff had an interest equally with the defendant. [They also cited *Williams* v. *Leper* (1); *Fitzgerald* v. *Dressler*. (2)]

The Hon. M. M. Macnaghten was not called upon to reply.

VAUGHAN WILLIAMS L.J. In this case I think the judgment of Lord Coleridge J. was wrong. In my judgment the case clearly falls within the 4th section of the Statute of Frauds. A good many cases have been cited in the course of the argument. I do not suggest that they are not relevant cases. They differ more or less in their facts, but I think that one principle runs through them all, which is expressed in the note to the case of *Forth* v. *Stanton*, in 1 Williams' Saunders, 211e. I am about to cite from Williams' Notes to Saunders' Reports, 1871, vol. i., p. 233, but the principle is stated in similar terms in the previous edition. There have been later cases, but the same principle runs through them all. The principle is thus expressed in the note: "There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question, whether each particular case comes within this clause of the statute or not, depends, not on the consideration for the promise, but on

(1) (1766) 3 Burr. 1887. (2) 7 C. B. (N.S.) 374.

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the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise."

As I understand it, in any case where, in substance and in fact, an obligation has been undertaken by a person to the creditor to pay a debt due from another person, for which that other remains responsible, in the event of his making default, prima facie that is a guarantee, and the case comes within the 4th section of the Statute of Frauds. There are, however, some cases in which it has been held that, though, in substance and in fact, an obligation to pay the debt of another has been undertaken, yet the promise or undertaking is not a guarantee within the meaning of s. 4 of the Statute of Frauds: and, as I understand, the cases which are so excluded, or excepted from the operation of that section, are so excluded or excepted on grounds given in this note. The note goes on: "The test just above laid down was adopted by the Court in 10 A. & E. 453. *Green* v. *Cresswell*, 2 P. & D. 430, S. C.; where it was held that, if the plaintiff becomes bail to a stranger in consideration of the defendant's request and of the defendant's promising him to indemnify him, the plaintiff, against the consequences, no action lies upon such promise, unless it be in writing: and the Court refused to assent to the doctrine laid down in 8 B. & C. 728 (1828). *Thomas* v. *Cook*, 3 Mann. & R. 444, S. C., that a promise to indemnify does not fall within the words or policy of the statute . . . . But in *Batson* v. *King* (1859), 4 H. & N. 739 Pollock C. B. said that he thought *Green* v. *Cresswell* was not rightly decided. And the same learned judge, on the same occasion, said, 'If a man says to another "if you will, at my request, put your name to a bill of exchange, I will save you harmless," that is not within the statute. It is not a responsibility for the debt of another. It amounts to a contract by one that, if the other will put himself in a certain situation, the first will indemnify him against the consequences.' And in 4 B. & Sm. 414, at p. 419, *Cripps* v. *Hartnoll* (1863) the Chief Baron said that a mere promise of indemnity is not within the statute." Putting to myself the question, in which of the two categories this case comes, I think the answer clearly must be that this is not the case of a contract to indemnify a person

if he will put himself in a certain position, but a simple case of a guarantee of the debt of another. The note which I am citing goes on thus: "The test above laid down was also adopted by Cockburn C.J. in 7 C. B. N. S. 392, *Fitzgerald* v. *Dressler*, dwelling especially on the concluding qualification of the passage '*coupled with the absence of any liability on the part of the defendant or his property except such as arises from his express promise.*'"

In the present case there was, in my opinion, an absence of any liability on the part of the plaintiff except that which might arise from his contract of guarantee. The note goes on to deal with the ordinary case of a del credere agent. In that case the broker has to pay the debt of his customer if the customer makes default in so doing. There the obligation of the broker does not arise merely from the giving of a guarantee; it arises out of the main contract, the original contract between the broker and the principal, out of a state of things which existed prior to and independently of the obligation to pay the particular debt. In the present case the fact is that the plaintiff who gave this guarantee was in such a position, as the holder of a debenture of the company in respect of which he gave it, that it was clearly to his interest that the business of the company should continue to be carried on, and that goods should continue to be delivered to the company, so that, if and when he interposed to realize his security by the appointment of a receiver, there might be more which the receiver might take possession of for his benefit. He did not, however, give the guarantee in performance of an obligation under any antecedent contract, or of any obligation or liability under which he lay, independently of the particular promise which constituted the guarantee. His motive—I deliberately use the word "motive," and not "object" (1)—in giving the guarantee was that he thought that it would be for his advantage that the business of the company should continue to be carried on. I do not think that, in any sense in which the word "interest" has been used in any of the prior cases on the subject, the plaintiff here had any such interest as would make it true to say that he gave the guarantee

(1) See the distinction drawn by the Lord Justice in *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 786.

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by reason of any liability or obligation which existed independently of the guarantee, or that he was contracting for the protection of any right. The case seems to me to be one of a guarantee pure and simple, and therefore to come within the statute. For these reasons I think the appeal must be allowed.

KENNEDY L.J. I am of the same opinion. The question is as to the applicability of s. 4 of the Statute of Frauds to the present case. In considering the cases on the subject which have been so carefully brought before us, I cannot help feeling the force of what was said by Pollock C.B., both by way of interlocutory observation and afterwards in his judgment, in *Mallet* v. *Bateman* (1), with regard to the difficulties that arise if one does not apply a statute as nearly as possible in accordance with the ordinary meaning of its language. He said, in answer to the suggestion made in argument that to construe the statute as applying in that case was pushing it much further than it had yet been carried, that it was "honestly applying it rather, and not allowing a subtle device to prevail to take a case out of the statute." As a matter of policy, it is obvious that, in a case like the present, it would be most desirable to have some document in writing to shew what the bargain between the parties really was; but we have to deal with the effect of negotiations which took place orally, accepting of course for the purposes of our judgment the findings of the jury, which were to the effect that the agreement between the plaintiff and the defendant was that the former would pay the debt of the company, if the company made default, and that the plaintiff was induced to enter into that agreement by the fact, inter alia, that he had a debenture charge upon the assets of the company. The whole of the contention for the defendant seems to be that the fact that the plaintiff held this debenture is sufficient in this case to take out of the statute a contract which prima facie is certainly a guarantee, because it is found by the jury to be a contract to pay the debt of the company, if the company should make default; the ground of that contention being that under the debenture the plaintiff had an interest which, if he took certain steps, could be enforced on

(1) L. R. 1 C. P. 163.

such property of the company as he might find in their hands at the time when he enforced it. I must admit that, from the start, I have found the logic of that contention not easy to comprehend. I cannot see why, in the application of an enactment, the policy of which is based on the view that it is desirable in such a case that the contract should be expressed in writing, the mere fact that the guarantor had such an interest should make any difference, or why the enactment should or should not be applicable according as he had or had not a legal or equitable interest in the assets which might from time to time belong to the company, payment of whose debts was guaranteed.

When one looks for authority for this contention, it seems to be based on certain dicta to be found in the judgment of Stirling L.J. in *Harburg India Rubber Comb Co.* v. *Martin.* (1) Those observations must be treated with the respect due to anything said by that learned judge, but they appear to have been made by him from a feeling of duty to comment on the language used in earlier cases cited in the case before him, and, as I understand them, they bear especially on certain expressions cited by counsel from the judgment of Lord Esher M.R. in *Sutton & Co.* v. *Grey* (2), which again, when that judgment is looked at, appear to be explanations of language used in *Fitzgerald* v. *Dressler* (3); and I do not think that they really ought to have the construction which it has been sought to put upon them. I do not see any connection between the class of cases to which the Lord Justice was referring and which Vaughan Williams L.J. and Cozens-Hardy L.J. in *Harburg India Rubber Comb Co.* v. *Martin* (1) speak of as the "property cases," and such facts as we have to deal with in the present case. Whether Lord Esher M.R. was right in his suggestion that the word "transaction" should be substituted for "sale," and what he meant by "interest in the transaction," I do not think it necessary to inquire, for these expressions, and those used by Stirling L.J. in *Harburg India Rubber Comb Co.* v. *Martin* (1), appear to me to have relation to a class of cases which, in my opinion, have no relevance to a case like the present, where the facts merely are that a man who has

(1) [1902] 1 K. B. 778. (2) [1894] 1 Q. B. 285.
(3) 7 C. B. (N.S.) 374.

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Kennedy L.J.

a considerable interest in and holds a debenture of a company, and therefore, no doubt, desires that goods should continue to be supplied to it, gives a guarantee for payment of the price of goods supplied to it, in the event of default of payment thereof by the company. I cannot find that any one of the decided cases in which contracts have been excepted from the operation of s. 4 of the Statute of Frauds helps the defendant in the present case. *Couturier* v. *Hastie* (1) and *Sutton & Co.* v. *Grey* (2) are cases in which a contract as to the mode of carrying on business made between two parties, in the one case between a del credere agent and his principal, and in the other between brokers and a person who introduced customers to them,—who were really co-adventurers—contained an incidental agreement that they would settle accounts between themselves on a basis which depended on the extent to which third parties met their liabilities. Those cases do not appear to me to have any bearing on a case in which the only contract made between the parties is one of guarantee. It seems to me illogical to say that, where you have a contract which according to the terms of the statute must be in writing, the application of the statute can be affected by the circumstance that one of the parties is induced to make the contract by the fact that he is interested in that which is the consideration for it. There is no analogy between such a case and the so-called "property cases."

JOYCE J. The learned judge in the Court below has, in effect, held that the promise made by the plaintiff is excluded from that portion of s. 4 of the Statute of Frauds which relates to a promise to answer for the debt, default, or miscarriage of another person, because the person who in this case promised to answer for the debt of a company was entitled in equity to a debenture issued by that company. The learned judge, having deduced from what was said in the case of *Harburg India Rubber Comb Co.* v. *Martin* (3) the conclusion that, if in such a case the promisor were the legal owner of a debenture of the company payment of whose debt was guaranteed, s. 4 of the Statute of Frauds would not apply,

(1) 8 Ex. 40. (2) [1894] 1 Q. B. 285.
(3) [1902] 1 K. B. 778.

proceeded thereupon to hold that the circumstance that in the present case the title of the plaintiff to the debenture was only equitable made no difference. In that I should agree, if I thought that the statute would not apply, if the plaintiff had been the legal owner of the debenture. With all respect to the learned judge, I think that he misapprehended the effect of the judgments in *Harburg India Rubber Comb Co.* v. *Martin* (1) I do not think that there is anything in those judgments, rightly considered, to support the learned judge's view that, if in such a case the promisor were the legal owner of a debenture of the company, s. 4 of the Statute of Frauds would not apply. The present case has no analogy to a case where a person who has purchased, or has an interest in, goods, which are subject to a lien or charge, obtains a discharge of the lien or charge by undertaking to be responsible for payment of the debt in respect of which it existed. There is no agreement by the creditor in this case to release or forgo any claim against the company, and, the more one considers the case, the clearer it becomes that this is a simple case of a promise to answer for the debt, default, or miscarriage of another, and that there is no other contract or arrangement to which that promise is incidental; and, therefore, there is nothing to exclude the operation of the statute.

Appeal allowed.

Solicitors for plaintiff: *Kinch & Richardson, for Joseph Wilson, Long Eaton.*

Solicitors for defendant: *Geare & Willis, for Wallis & Starkie, Long Eaton.*

(1) [1902] 1 K. B. 778.

E. L.

C. A.
1913
Jan. 14.

[IN THE COURT OF APPEAL.]

REX *v.* EASTON.
Ex parte OULTON.

Education—Public Elementary School—New Non-provided School—Power and Duty of Local Education Authority to provide Furniture—Education Act, 1902 (2 *Edw.* 7, *c.* 42), *ss.* 7, 8.

Where persons other than the local education authority provide a new school under the provisions of s. 8 of the Education Act, 1902, the local authority have power to provide and pay for the furniture required to equip it as a public elementary school by reason of the obligation imposed upon them by s. 7, sub-s. 1, to "maintain and keep efficient all public elementary schools within their area which are necessary."

Two new non-provided schools were opened as public elementary schools and each school was subsequently placed by the Board of Education upon the annual grant list as from the respective dates of opening. All the furniture for one school was supplied and paid for by the local education authority before it was opened; the other school, when opened, was provided with furniture belonging to the managers, which was unsuitable and afterwards, but before the date when the Board of Education placed the school upon the grant list as from the date of opening, was removed by the local authority and replaced by new furniture at their expense:—

Held (Sir Samuel Evans, President, dissenting), that the local education authority had power to provide and pay for the new furniture of each school under s. 7, sub-s. 1, of the Education Act, 1902.

Decision of the majority of the Divisional Court (Pickford and Bankes JJ., Darling J. dissenting as to the unfurnished school) [1912] 2 K. B. 161, affirmed.

Appeal from a decision of a Divisional Court, Pickford J. and Bankes J. (Darling J. dissenting as to an unfurnished non-provided school) (1), making absolute a rule nisi which called upon the district auditor to shew cause why a writ of certiorari should not issue to remove into the King's Bench Division the disallowances and surcharges made by him and specified in his certificate in order that they should be quashed.

The question raised by the appeal was whether when persons other than a local education authority provide a new school

(1) [1912] 2 K. B. 161.

under the provisions of s. 8 of the Education Act, 1902, the local education authority have power to provide and pay for the furniture required to equip it as a public elementary school by reason of the obligation imposed upon them by s. 7, sub-s. 1, to "maintain and keep efficient all public elementary schools within their area which are necessary."

The promoters of two new non-provided schools in the city of Liverpool duly gave notice of their intention to provide such schools, under s. 8 of the Education Act, 1902, and no appeal was carried to the Board of Education under that section.

The plans for one of these schools, called St. Sebastian's, were approved by the Board of Education on October 13, 1908. The school buildings were completed, and the school was opened on May 3, 1909.

At the date of the opening the promoters had provided the school with furniture, which, however, was found to be unsuitable, and on June 28, 1909, the Board of Education wrote to the Liverpool local education authority saying that "the Board understand that the greater part of the furniture which has been placed in the school is of an unsuitable character. . . . . the Board will be unable to place the school on the annual grant list until they are satisfied that it is properly furnished."

On July 6, 1909, the Liverpool local education authority wrote to the Board of Education saying that "the education committee have the question of the furnishing of the school under careful consideration."

On August 10, 1909, the local education authority removed the furniture which had been provided by the promoters and supplied new desks and cupboards, and subsequently paid for them, and on September 8 they again wrote to the Board of Education saying that "furniture of a suitable description has been provided at the above named" (St. Sebastian) "school."

On October 29, 1909, the Board of Education informed the local education authority that the school had been placed on the annual grant list as from May 3, 1909.

The plans for the other school, called St. Hugh's, were approved by the Board of Education on January 8, 1909. The school buildings having been completed, the school was opened

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on September 6, 1909; and on June 28, 1910, the Board intimated to the local education authority that the school was placed on the annual grant list as from September 6, 1909. The promoters had not provided any furniture for this school, and on August 31, 1909, the education authority supplied new desks and cupboards for the use of the school and afterwards paid for them.

The district auditor disallowed the payments made for the desks and cupboards for each school, and surcharged the members of the education authority who had authorized these payments. The auditor, by his certificate, stated that his reasons for the disallowance of these payments were that "at the time the furniture was supplied to these schools they were not 'public elementary schools,' within the meaning of s. 7 of the Education Act, 1902 (1), and the local education authority was not therefore under any legal obligation to maintain and keep them efficient."

The applicant, who was one of the members surcharged, obtained a rule calling upon the auditor to shew cause why a writ of certiorari should not issue to remove into the King's Bench Division the disallowances and surcharges made by him and specified in his certificate in order that they should be quashed.

The Divisional Court made the rule absolute.

The auditor appealed.

Buckmaster, K.C., and *R. M. Montgomery*, for the appellant. The question is whether s. 7, sub-s. 1, of the Education Act, 1902, which requires the local education authority to "maintain and keep efficient all public elementary schools within their area which are necessary," casts upon them the burden of equipping the school building and therefore gives them the power of incurring the necessary expense for that purpose. Until the building is equipped to the satisfaction of the Board of Education, the school does not become a public elementary school, and it follows that there is no duty upon the local education authority to equip it. It is clear from s. 7, sub-s. 1 (*a*), (*b*), (*c*), (*d*), and (*e*),

(1) See note on p. 78, post.

that the Legislature contemplated two entities—a school and a school house. The managers must build and equip the school house in the case of a school not provided by the local education authority before the obligation to "maintain and keep efficient" falls upon the local education authority. The distinction between the school and the school house is also drawn in s. 7, sub-s. 2. Sect. 8 relates to the provision of new schools, and it is under that section that the buildings of St. Sebastian's and St. Hugh's schools were erected. The expression "public elementary school" means an equipped school and not a school house ready to be equipped. Sect. 8, sub-s. 3, shews that there is no distinction between a transferred public elementary school and a new school and it is therefore essential to arrive at the definition of a public elementary school. That definition is contained in the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), for by s. 3 of that Act an "elementary school" is defined to mean "a school or department of a school at which elementary education is the principal part of the education"; s. 7 provides that "every elementary school which is conducted in accordance with the following regulations shall be a public elementary school within the meaning of this Act"; one of those regulations (s. 7, sub-s. 4) is that "the school shall be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant"; and the conditions are stated, in s. 97, to be those contained in the minutes of the Education Department in force for the time being. The conditions are now contained in the Code of Regulations, which, by art. 20, provides that a school must be adequately and suitably equipped with the necessary apparatus, including desks, furniture, books, and maps; and, by art. 25 (*a*), defines a "public elementary school" to be "a school which is an elementary school within the meaning of section 3 of the Elementary Education Act, 1870, and satisfies the further conditions imposed by section 7 of the same Act."

By s. 24, sub-s. 1, of the Act of 1902 any expression to which a special meaning is attached in the Elementary Education Acts, 1870 to 1900, is to have the same meaning in the Act of 1902. Therefore "public elementary school," in s. 7, sub-s. 1, of the

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Act of 1902, must have the same meaning as in the Act of 1870; and it is clear from the provisions of the Act of 1870 and of the Code that a "public elementary school" means a properly equipped school.

If the Board of Education once approve of the school, it becomes a public elementary school, even though it were not in fact properly equipped. If the schools had been built before the Act of 1902 came into operation they must have been equippep at the expense of the persons who provided them, and there is no difference made by the Act of 1902 with regard to schools subsequently built. In delivering judgment in *Attorney-General* v. *West Riding of Yorkshire County Council* (1) Lord Davey said that the words of the Act meant no more than "maintain in a state of efficiency," i.e., to maintain in an existing state of efficiency, including desks, chairs, and cupboards. The local education authority is bound to do anything that is necessary to maintain efficiency, but no more. It is clear from their letter of June 28, 1909, that the Board of Education would not have placed St. Sebastian's school upon the grant list if other furniture had not been supplied to it, and the inference drawn by Bankes J. in giving judgment in the Court below (2) that the Board were satisfied with the furniture as originally supplied was the result of a mistake as to the facts. In the case of a new non-provided school, erected under s. 8, the responsibility of the local education authority does not begin until there is a properly equipped school. The natural meaning of the words "maintain and keep efficient," in sub-s. 1 of s. 7, is that the obligation is only to maintain and keep efficient a school which is efficient and not to put it into a state of efficiency by providing the equipment in the first instance. The real distinction is that between capital and income expenditure, and the local education authority is only responsible, under the words "maintain and keep efficient," for income expenditure; and the expense of equipping a new school is capital expenditure. [Sects. 14, 18, 19, and clause 14 of the Second Schedule of the Education Act, 1902, were also referred to.]

Sir R. Finlay, K.C., and *Courthope-Munroe*, for the respondents. The contention on behalf of the appellants is in effect that no new

(1) [1907] A. C. 29, at p. 39. (2) [1912] 2 K. B. at p. 167.

non-provided school can be taken over by the local education authority unless it is fully equipped by the promoters, so as to be in the condition necessary for a grant-earning school. That contention involves the proposition that the promoters of a non-provided school must not only provide teachers but everything else necessary to earn the grant. Sect. 6, sub-s. 2, of the Education Act, 1902, shews that in order to comply with the Act there must be six managers of a non-provided school. The appointment of teachers rests (s. 7, sub-s. 7) with the managers, but the managers do not come into existence until the schools are taken over by the local education authority under s. 8, and there is therefore until that time no one who can appoint teachers. The furniture is the property of the local education authority, and if the managers use it out of school hours they are liable to make good any damage to the furniture. Clause 14 of the Second Schedule is confined to the transfer of schools in existence on the appointed day. No similar provision is made or required with regard to new schools because the furniture in that case belongs to the education authority. The decision in *Gillow* v. *Durham County Council* (1) shews that the managers of a non-provided public elementary school after it is taken over by the local education authority have to appoint a caretaker and cleaner, and similarly they would have to appoint the teachers. Sect. 8 enacts in effect that any person not the local education authority wishing to provide a school is to provide the building. By providing the building he provides a public elementary school. In the present case the Board of Education recognized the schools as from the dates they were opened. Arts. 18, 20, and 26 (*a*) of the Code of 1909 all relate to the actual carrying on of a school, and if not complied with the school is to be taken off the parliamentary grant list. Sect. 8 of the Act of 1902 must be read with s. 7 with regard to the respective functions of the managers and the local education authority.

Buckmaster, K.C., in reply. The school must be ready to be carried on as a going school (although it may be growing and improving) before there is any obligation upon the local education

(1) [1913] A. C. 54.

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authority to take it over. Otherwise the local authority could be compelled to take over a barn. [Sect. 6 and s. 11, sub-s. 2, of the Education Act, 1902, were also referred to.]

LORD ALVERSTONE C.J. This case has been argued with extreme ability, and I do not think—although I wish to do full justice to all the arguments which have been addressed to us on behalf of the appellant—that I should gain any advantage by considering the matter further. I have very clearly in my mind the views presented to us and the contentions which they involve. In my judgment the decision of the Divisional Court was right and this appeal ought to be dismissed.

The case arises with regard to certain payments made by the local education authority of Liverpool for new desks and cupboards in order to equip two Roman Catholic schools, respectively called St. Sebastian's and St. Hugh's. The only point which arises is whether or not the local education authority had the right to buy the furniture in order that the course of preparation of the schools for use as public elementary schools might be proceeded with. I quite agree that the building may not be entitled to have the grant until or to continue to have it unless certain other things are done in addition to the provision of furniture, but I think, for reasons I will try and explain, that the argument on behalf of the appellant is without sufficient foundation having regard to the real position.

I draw no distinction between St. Sebastian's and St. Hugh's. In my opinion the facts with regard to St. Sebastian's school, namely, that furniture said to be unsuitable was placed in that school by the promoters and was afterwards taken out, with the result that the local education authority had to provide new furniture, placed that school in practically the same position as St. Hugh's school, and, with great deference to my brother Darling, I do not understand why in his judgment he differentiated between St. Sebastian's and St. Hugh's simply because some unsuitable furniture had been placed in the former school by the promoters and had to be taken out again.

At the time when this question as to who is to provide furniture for a new non-provided school arises there are no

managers in existence in the sense of managers appointed under the Act of 1902, although they may be subsequently appointed.

Sect. 6, sub-s. 2, shews that in the case of a public elementary school not provided by the local education authority there are to be not only foundation managers not exceeding four, but also (sub-s. (*b*)), where the local education authority are the council of a borough, a number of managers not exceeding two appointed by that council. Those managers have, under s. 7, the power of appointing and dismissing teachers, but they have to carry out any directions of the local education authority with respect to the number and educational qualifications of the teachers to be employed for secular instruction and for the dismissal of any teacher on educational grounds, and the consent of the local education authority is required to the appointment of teachers, but can only be withheld on educational grounds. The local education authority has power to inspect the school. At the time this furniture had according to the Act to be provided the managers had with reference to it no powers under the statute.

A donor or owner of a school has under s. 11 certain privileges, which, however, have nothing to do with the provision of equipment or of furniture, and it is to be noticed that the donors or owners of new non-provided schools are only dealt with in the Act in conjunction with existing owners, trustees, or managers of schools.

The question for our decision is whether the local education authority may, in order to complete a school so that it can obtain the parliamentary grant, expend money in order to provide the furniture. The auditor suggests, and it has been contended on his behalf, that the expenditure is ultra vires. That is the only question we have to decide. Sect. 7, sub-s. 1, enacts that "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary . . . ." On behalf of the appellant Mr. Buckmaster contends that those words predicate that there is in existence a public elementary school which can be maintained and kept efficient. But the question which has been in my mind during the argument and which requires an answer is why under those words are the local education authority not

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entitled to keep and maintain a school which is only in the course of being made a public elementary school? Attention must be paid to the fact (although I do not wish to attach undue importance to it) that the schools with which we have to deal were provided under s. 8. The local education authority or any other persons who propose to provide a school must give notice of their intention to do so. They can only call into aid s. 8 for the purpose of providing a new public elementary school. Ex hypothesi that means provision of equipped buildings which will in course of time be used as a public elementary school and will be placed upon the grant list if the certificate from the Board of Education is obtained and will continue to have the grant if the school is properly conducted. In the circumstances of this case it is not suggested that either of the buildings which were handed over to the local education authority was not a building intended to be used as a public elementary school and, when equipped, a school which the local education authority will have the obligation of keeping and maintaining.

On behalf of the appellant Mr. Buckmaster contended that that obligation did not arise till they can be started as equipped schools. We must be guided by such light as the statute throws upon the question as to who is to bear the burden of equipping the schools, and in my judgment there are certain considerations which point to the fact that the statute does not contemplate any part of the burden of equipment being borne by the managers. I have already dealt with the owner; he is certainly not in a better position than the managers. I think s. 7, sub-s. 1 (*d*), goes a long way to help us to decide this question. It says "The managers of the school shall provide the school house free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority." It is not suggested that under these words any obligation is cast upon the managers to equip the school, put in the furniture, maps,

and so on. In my judgment it follows from the decision of the House of Lords in *Gillow* v. *Durham County Council* (1) that "maintaining" a school includes providing proper teachers. There is in my judgment an important distinction between the obligation to provide the buildings and the money for such alterations and improvements in the buildings as may be reasonably required by the local education authority on the one hand and the obligation to provide the cost of equipment on the other hand. It is difficult to see why if the original cost of the equipment is to be borne by persons not indicated by the statute—there is certainly no indication that it is to be borne by the managers—the cost of the improved equipment should not also be borne by them. It is probable that during the first few years a very large outlay on equipment will be required if the scholars are found to be of a certain class, but maps and other things originally provided were provided for a school of the kind it was at the time imagined it would be. In my judgment the language of clause (*d*) of s. 7, sub-s. 1, clearly indicates that the only responsibility placed upon the managers when they come into existence is the obligation to provide and to improve the school house from time to time. I also attach considerable importance to the local education authority being given control of all expenditure required for the purpose of maintaining and keeping efficient all public elementary schools. It is not denied that furniture must be provided before it becomes a public elementary school. I am not pressed at all with the use in s. 7, sub-s. 1, merely of the words "maintain and keep." The school must have a beginning, and in my opinion there is no possible reason for giving the local education authority control of all expenditure required for the purpose of making the school a public elementary school — including the appointment of teachers and others—if they have no power to spend money on the absolutely essential thing, the equipment. In my opinion it is within the power of the local education authority, who have to maintain and keep efficient all public elementary schools, to make them efficient as public elementary schools, and Mr. Buckmaster's ingenious argument on behalf of the auditor

(1) [1913] A. C. 54.

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that there must be an entity in existence as a public elementary school before the local education authority can expend any money does not commend itself to my judgment, and I am not able to adopt it.

It has been rightly said during the argument that there are a certain number of conditions schools must fulfil before they can obtain the grant. So far as it bears upon the case that fact is rather against the appellant than in his favour. Art. 17 (*a*) of the Code of 1909 provides that "Before recognising newly erected premises as suitable for a public elementary school, the Board must be satisfied by the submission of plans . . . . that the Building Regulations are complied with." Art. 20 says "The school must be adequately and suitably equipped with the apparatus requisite for its curriculum, including desks, furniture, books and maps, ..." and for the purpose of this case, I assume that the contention that if the school, when the application for the grant is made, is not properly supplied with furniture, books, desks, and maps, the Board of Education may decline to place it on the list is correct. But the fact that in those circumstances the school cannot succeed in obtaining the inclusion of its name upon the parliamentary grant list and therefore cannot obtain the annual grant in accordance with that list does not assist me in determining who the persons are who are to provide and pay for the furniture, and still less does it enable me to say that under the words "maintain and keep efficient" all public elementary schools it is ultra vires to make a school a public elementary school or a school to be used as a public elementary school by finding the furniture which is necessary before it can be so used. If any case had been made suggesting that it was going to be used or the expenditure was required for some other purpose, different considerations would arise.

In my judgment it is not necessary that the school should be an equipped public elementary school in the sense of complying with the Code and the provisions of the Act of 1870 so as to be entitled to the parliamentary grant before the power of the local education authority to maintain and keep it efficient arises. Nor do I suggest that in order to be entitled to the parliamentary grant the equipped school need not fulfil the conditions of the Code, as

laid down by the Act of 1870. Sect. 24 of the Education Act, 1902, by reference to the Elementary Education Act, 1870, supports Mr. Buckmaster's contention that in 1870 "elementary schools" and "public elementary schools" were known terms (s. 3 of the Act of 1870), and that in order to obtain the parliamentary grant a school must be a public elementary school. But the fact that there must be in existence a public elementary school in order to obtain the parliamentary grant in no way compels us to construe the Act of 1902 in the way in which Mr. Buckmaster contends that we ought to. We are only dealing in this case with the provision of a public elementary school under the Act of 1902. That is the object of the proceedings under s. 8. There was no opposition to this, and we must take it that it was decided that these schools were necessary as public elementary schools. All we have to decide is whether the Divisional Court was wrong in holding that there is nothing in the Education Act, 1902, which prohibits the local education authority from providing the furniture, and in my opinion the language of s. 7 of the Act of 1902 indicates that the provision of and making the building fit for a public elementary school and maintaining the building as a public elementary school is thrown upon the managers, the provision of the equipment falls upon the local education authority, and the expenditure of the necessary money is expenditure "other than expenditure for which, under this Act, provision is to be made by the managers." It is not suggested that there is any provision in the Act for the expenditure of this money by the managers, and in my judgment that omission points to the fact that the local education authority are to be responsible for the equipment of the school as distinguished from the building. Clause 14 of the Second Schedule to the Act of 1902 confirms my view. I do not suggest that it is very conclusive either one way or the other. It certainly was unnecessary, if the furniture was to be provided and the school equipped with suitable apparatus by the managers or by the donor or owner of the school. It seems to me that there is considerable force in the consideration of the uncertainty which would be involved in any other view. How is the school to be sufficiently equipped

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by the owner to enable him to obtain the grant? What equipment is necessary for that purpose? When once the furniture and equipment are provided by the local education authority there is no difficulty; but it would be an extraordinary state of things that a certain amount of furniture and equipment sufficient to start the school as an elementary school must be borne by persons other than the local education authority, but the moment any more furniture is required it is to be provided by the local education authority in consequence of there being an entity, namely, the public elementary school, which they are bound to keep and maintain (according to the argument on behalf of the appellant a growing plant or improving school), and that there is then something which would justify the expenditure by the local education authority under the words "keep and maintain."

In my judgment there is no ground for holding that it was ultra vires of the local education authority to spend this money upon the furniture, and I think the view taken by the majority of the Divisional Court—by all three judges, so far as one school was concerned—is correct. The rule must therefore be discharged.

FARWELL L.J. I have come to the same conclusion. The question is really one between the donor, the local education authority, and possibly the Board of Education. There are certain persons mentioned in s. 8 of the Education Act, 1902, who have a right of objection to the new school, but if and when it is once determined that the new school is necessary,—the point is left to the Board of Education in case of objection—then comes the question whether the school being necessary, and the school building being tendered, the local education authority has any authority to say "we will not have it because it has not been properly furnished." I fail to see how they have any power to decline that which has been held by the Board of Education, or admitted without such holding, to be necessary. The first duty, or one of the duties at any rate, of the local education authority is, under s. 5 of the Education Act, 1902, by reference to ss. 18 and 19 of the Elementary Education Act, 1870, to provide sufficient public school accommodation, and for that purpose they may provide, by building, school houses properly

fitted up, and improve, enlarge, and fit up any school house provided by them, and supply school apparatus, &c. A donor proposes to relieve them of part of the expense which would otherwise fall upon them by providing a school building which is necessary. I fail to see how they can refuse to accept it.

The next question is, What is the public elementary school referred to in s. 8 which is to be so given as a new school? I think that, in considering this question, a reference to ss. 6 and 7, which deal with the carrying on of existing public elementary schools, only tends to introduce confusion. We are now dealing with a school to be called into existence for the first time. It is found to be necessary. Then the question is, What is meant in s. 8 by public elementary school? On behalf of the appellant it has been contended that it must be a building fully equipped, ready to be carried on as if it were a going school. It appears to me to be impossible to accept that contention, because for that purpose not merely chairs, desks, and benches are required, but books, maps, teachers, and school managers. Those would not be provided until the school is actually started. The school that is to be provided appears to me to be the actual building which has to be approved by the Board of Education. I do not see how a new school, beginning for the first time, which is what s. 8 deals with, can be treated as a started and going on school. The school must have a beginning, and the school building is the foundation of it. The school building having been provided, the local education authority is to obey art. 20 of the Code. They must adequately and suitably equip it with apparatus requisite for its curriculum, including desks, furniture, books, and maps. The fact that the auditor himself shrinks from disallowing the books and maps is not in any way conclusive, but I confess I do not see how, if the argument on his behalf is right, he was justified in passing those items, because they are as requisite to a going school as furniture.

The other alternative, which might be more possible, is that, in order to justify the expenditure which the auditor objects to in the present case, a school must be in a position to earn the grant at the time of the expenditure. But that proposition will not help the appellant, because on the facts of the present case the school,

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according to the statement of the Board of Education (and under the Act of 1902 the Board is the only authority for saying whether it is so or not), was at a date anterior to the date of this particular expenditure in a position to earn the grant. The Board of Education itself, after the expenditure was made, fixed a date anterior to the expenditure being made as from which the schools had been respectively placed upon the annual grant list. The law allowed the Board of Education to do so, and it has chosen to say that it was so, and, therefore, that ground of attack upon the expenditure on the furniture seems to me to fail. I can see no ground whatever for saying that a public elementary school in the case of a donor differs from a public elementary school in the case of the local education authority. In the case of the local education authority I think it is clear they would provide the equipment under s. 5 of the Education Act, 1902, coupled with ss. 18 and 19 of the Elementary Education Act, 1870, and I think it is clear they are bound to do the same thing when a donor has given the building.

I desire to make one further observation. It is not, perhaps, very conclusive, but as I understand the Act of 1902 the furniture in the schools which were taken over as existing schools became either the property of the local education authority, or at any rate it is irremovable by the owners against the will of the local education authority, which must renew and replace it, that is, provide fresh furniture when the old is worn out or has disappeared. Therefore to that extent in the case of these non-provided schools the local education authority must find money for renewing and replacing the furniture, and I cannot see any principle which need affect the consciences of the ratepayers in consequence of their having to find the money to provide the furniture de novo instead of replacing the old furniture. If there is any old furniture the ratepayers get the benefit of it.

I think clause 14 in the Second Schedule to the Education Act, 1902, is only useful as shewing that the school furniture was treated by the Legislature as appropriated to the use of the school. That would have been wholly unnecessary if the local education authority had not to make a payment for it. That, however, is a very small point. In my judgment on the true construction of

s. 8 of the Act of 1902—that section must be read as being distinct from ss. 6 and 7, which deal with a different subject-matter—the conclusion at which the majority of the Divisional Court arrived is correct, and I agree with it for the same reasons.

SIR SAMUEL EVANS, PRESIDENT. I regret to say that I cannot come to the same conclusion as my learned brethren, and it is with great diffidence that I express the conclusion at which I have arrived, but it is my duty to do so.

The point is, in my judgment, the same in the case of St. Sebastian's school as of St. Hugh's. Some distinction was made in the Court below in all three judgments, but I agree with the view the Lord Chief Justice has expressed that this case must be dealt with as if the two schools were for the purpose of this decision—as in my opinion they were in fact—upon the same footing. The question is whether the local education authority had the right to use public money for the purpose of supplying furniture which was requisite for the adequate and suitable equipment of an elementary school in a building which was proposed to be provided by persons other than the education authority as a public elementary school. The local education authority have certain obligations cast upon them by the Education Act, 1902. In so far as it is necessary to provide money for carrying out those obligations they have to provide the money, but if a point is arrived at at which no obligation exists, no expenditure of money on the part of the local education authority is justified. The expenditure of money must be exactly coterminous with the obligations which are cast upon them by the statute.

Now the scheme of the Education Act, 1902, was broadly that two classes of elementary schools should continue to exist in this country. One class was that of the provided schools, namely, provided by the local education authority itself at the public expense and altogether under public control and management. The other class of school existed and came to be known after the Act of 1902 as non-provided. It is a school in which a portion of the management is transferred to the public, but the greater part of it remained in the management of persons nominated or

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elected by those who took an interest in the denomination to which the school belonged. I agree respectfully with Farwell L.J. when he says that we must distinguish clearly between ss. 7 and 8 of the Act of 1902. It is quite obvious, so far as the main portion of s. 7 of the Act of 1902 is concerned, that it was intended to deal with schools in existence, and which might continue to exist, as non-provided schools. The scheme as to those schools was that the schools must continue to be used, conducted, and carried on as public elementary schools. The school buildings were to be repaired by the managers out of funds provided by them, but the local education authority was to have the use of all the furniture in those schools. Those schools were already equipped at the time they were taken into the statutory control of the local education authority. I think it is fairly clear that, if there was a school which up to that time had been used as a public elementary school, but had ceased to be in truth a public elementary school because it was not properly equipped, there was no obligation on the local education authority to take it over. They could have said, "The school has ceased to be an elementary school, and until it again becomes a school which can under the statute be properly regarded as a public elementary school, we are not under any obligation under s. 7 to maintain it."

So much for the schools which were already in existence. I have pointed out that the equipment of the schools was to be at the expense of those who provided them—those who desired the denominational education. With regard to s. 8 it is clear that it was intended that these two classes of schools might continue side by side, because in one locality there might be a sort of race, more or less indecent in character, between one class of person or authority and another as to who should provide a new school; but a new school might become necessary, and in the present case two schools in the district where these two schools were built did become necessary, and some persons were minded to provide the schools. The sole question before us, in my judgment, is whether the buildings handed over as bare buildings were public elementary schools provided by these donors or not. Now the local education authority might themselves have stepped in in each and said "This school is necessary and we will provide it."

Then they would have erected the building; and suppose they had gone to the Board of Education and said, "This is a building erected in accordance with the plans you approved, and as we do not propose to do any more, nobody can find the furniture and we do not propose to," it is impossible to suppose that the Board of Education would regard that as a public elementary school. If it is not a public elementary school when it is provided by the local education authority how can it be a public elementary school—left in that state—when it is provided by a private individual? If it had been intended by the Legislature that the expense of the equipment of a future non-provided school should be imposed upon the ratepayers, although the equipment of the existing schools had been carried out by those who provided them, it would have been easy to use language to the effect that "where the local education authority or any other persons propose to provide a building or school house for the purpose of a new elementary school they shall give public notice of their intention so to do," &c.

In my view, putting it shortly, four walls without desks and cupboards—the articles of furniture in question in this case—are not a public elementary school. The four walls or the building might be suitable for many purposes. A person might undertake to found a hospital, and might erect a bare building which was quite suitable, but without beds or any adequate or suitable hospital equipment in the building it would not be in my opinion a hospital. I think those who undertook to provide these schools ought to have been able to say to the local education authority: "We have provided for you not only four walls but a building in which we have put the necessary apparatus—a building which is adequately and suitably equipped for you to take over and to conduct as a public elementary school." I do not think it is necessary to go so far as to say that a school must be actually earning a grant or in a position through scholars and teachers to earn a grant when the local education authority are required to take it over, but I think before they can be called upon to take it over and maintain it and keep it efficient the persons who undertake to provide it under s. 8 ought to be able to say "This is a public elementary school ready for you to open,

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to carry on, to maintain, and to take into your control as a public elementary school."

I do not propose to refer with greater particularity to the material sections, but speaking generally I agree with the reasons and conclusions given by Darling J. in that part of his judgment in the Court below in which he dissented from the judgments of the majority of the Court with regard to St. Hugh's School.

In my view this appeal ought to have succeeded.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co.*

Solicitors for respondents: *F. Venn & Co., for E. R. Pickmere, Liverpool.*

NOTE.—Education Act, 1902 (2 Edw. 7, c. 42), s. 7, sub-s. 1: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:— . . . .

"(*d*) The managers of the school shall provide the school house free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of funds provided by them, keep the school house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority: Provided that such damage as the local authority consider to be due to fair wear and tear in the use of any room in the school house for the purpose of a public elementary school shall be made good by the local education authority."

Sub-s. 4: "One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under, and complies with, the provisions of this section."

Sect. 8, sub-s. 1: "Where the local education authority or any other persons propose to provide a new public elementary school, they shall give public notice of their intention to do so, and the managers of any existing school, or the local education authority (where they are not themselves the persons proposing to provide the school), or any ten ratepayers in the area for which it is proposed to provide the school, may, within three months after the notice is given, appeal to the Board of Education on the ground that the proposed school is not required, or that a school provided by the local education authority, or not so provided, as the case may be, is better

suited to meet the wants of the district than the school proposed to be provided; and any school built in contravention of the decision of the Board of Education on such appeal shall be treated as unnecessary."

Sub-s. 2: "If, in the opinion of the Board of Education, any enlargement of a public elementary school is such as to amount to the provision of a new school, that enlargement shall be so treated for the purposes of this section."

Sub-s. 3: "Any transfer of a public elementary school to or from a local education authority shall, for the purposes of this section, be treated as the provision of a new school."

Second Schedule, clause 14: "The local education authority shall be entitled to use for the purposes of the school any school furniture and apparatus belonging to the trustees or managers of any public elementary school not provided by a school board, and in use for the purposes of the school before the appointed day" (March 26, 1903).

Code of Regulations for Public Elementary Schools, 1909, art. 17 (*a*): "Before recognising newly erected premises as suitable for a public elementary school, the Board must be satisfied by the submission of plans, drawn in accordance with the prescribed requirements, that the Building Regulations are complied with."

Art. 18: "The premises of the school must be healthy, safe in case of fire, must have suitable and sufficient sanitary and cloak room accommodation for the scholars in attendance and for teachers, must be adequately lighted, warmed, ventilated, cleaned and drained, must be kept in proper repair, and must be sufficient, convenient, and suitably arranged for the instruction of the children in attendance according to their age."

Art. 20: "The school must be adequately and suitably equipped with the apparatus requisite for its curriculum, including desks, furniture, books, and maps. Provision should be made for securing an adequate supply of suitable books for the course of general reading in the higher classes of the school, and for bringing to the notice of the scholars such agencies as may assist them in the continuation of their studies in after life. Dictionaries and atlases should be provided for the scholars in the higher classes. In cases where the school does not possess a school library, arrangements should be made to supply books for the reading of the scholars by co-operation with organisations existing for the purpose or otherwise."

Art. 26 (*a*): "The conditions required to be fulfilled by a school in order to obtain an annual grant are those contained in this Code: (*Sec.* 97, *Elementary Education Act*, 1870.)"

J. E. A.

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Jan. 23, 27.

In re RAMSAY.
Ex parte DEACON.

Bankruptcy—Return of Goods to Creditor—Fraudulent Preference—Motive of Debtor — Evidence — Collateral Facts — Admissibility — Pressure — Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 48.

Where a trustee in bankruptcy attacks a transaction between a debtor and his creditor as a fraudulent preference, evidence of other acts of preference in favour of other creditors, committed by the debtor shortly before or after the transaction impugned, is admissible to shew the debtor's intent.

A debtor, insolvent to his knowledge, wrote to his principal creditor, whose account exceeded 3000*l.* and who held current bills for 1000*l.*, two of them just falling due for sums amounting together to 512*l.*, asking for one of the bills to be renewed. The creditor replied that the bills must be met and the account considerably reduced. The debtor telegraphed suggesting a return of goods. The next day at an interview the creditor demanded a substantial payment or a return of goods, otherwise he would "make it hot" for the debtor. The debtor agreed to return goods and during the next few days returned goods to the value of 1808*l.*, being more than three times the amount of the two bills then due. Within three months the debtor became bankrupt:—

Held, on the evidence, that the return of the goods was not caused by any real pressure on the part of the creditor but was the voluntary act of the debtor, and therefore the transaction was a fraudulent preference.

This was an application by the trustee in bankruptcy to obtain a declaration that a transaction between the debtor and the respondents was a fraudulent preference.

The debtor was a manufacturer of ladies' blouses in a large way, and had works at Kendal in Westmorland, at Carnforth in Lancashire, and at Old Street in London. His principal creditors were the respondents, F. W. Millington & Co., Limited, of Manchester. He owed them, for Swiss embroidery and other stock supplied to his mill at Kendal between November, 1911, and February, 1912, for the coming spring business, some 3700*l.*, for which they held current bills amounting to 1000*l.*, and the balance of the debt was on open account. Two of these bills were falling due, one for 300*l.* 16*s.* 3*d.* on March 4 and the other for 211*l.* 12*s.* 6*d.* on March 14, making together 512*l.* 8*s.* 9*d.* At the end of February

the debtor's manager wrote the respondents asking them to renew the bill falling due March 4. In reply the respondents drew attention to the debtor's account and stated that the bills must be met and the account considerably reduced. On March 12 the debtor telegraphed from London to the respondents proposing a return of their goods, and on March 13 an interview took place at Manchester between the debtor and Mr. Millington, the manager of the respondents. At this interview there was no threat of legal proceedings, but Mr. Millington insisted on a substantial payment or a return of goods, and said that, if the debtor did not do that, the respondents would go for him and make it hot for him; and the debtor arranged for a return of goods and that the bills should be held and to pay the balance of his account by fortnightly instalments of 150*l.* On March 18 Mr. Millington went to the mill at Kendal, when samples of his goods in stock there were laid out for his inspection, and he selected all the goods which had not been broken into (about three-fourths of the amount), and they were returned to the respondents between March 19 and 22, 1912; and the respondents credited the debtor in their books with 1808*l.* 6*s.* 11*d.*, being the invoice price of the returned goods less a small discount, there being at that time only the two bills for 512*l.* 8*s.* 9*d.* due.

On May 2 the debtor executed a deed of assignment for the benefit of his creditors, and on May 29 a receiving order was made against him on a creditors' petition based on the deed of assignment as an act of bankruptcy. Adjudication followed and Mr. Deacon became the trustee in bankruptcy. In December the trustee served the respondents with a notice of motion for a declaration that the delivery by the debtor to the respondents between March 19 and 22, 1912, of goods to the value of 1808*l.* 6*s.* 11*d.* was void as a fraudulent preference, and for an order on the respondents to pay that sum.

The other material facts are sufficiently noticed in the arguments and judgment.

Clayton, K.C., and *F. Mellor*, for the trustee. In February, 1912, the debtor was hopelessly insolvent to his knowledge, and the question is whether the goods were returned by him with a

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view to prefer the respondents. At this time the debtor had a number of favourite creditors, and it is submitted that evidence of other acts of preference committed by him shortly before or shortly after this particular transaction is admissible.

E. W. Hansell, for the respondents. Evidence of collateral facts is not admissible in evidence against the respondents.

Clayton, K.C., for the trustee. In Taylor on Evidence, 10th ed., p. 264, § 338, it is stated that "where the *knowledge*, *intent*, or *good faith*, of a party is material, evidence may be admitted to prove facts which happened before or after the principal transaction, even when they have no direct or apparent connexion with such transaction." Here, in considering the debtor's *intent*, it is material to shew that he had other creditors whom he was preferring about this time.

[PHILLIMORE J. In cases of false pretences in the criminal Courts, in order to shew that the pretence was not an accident, but was a false and fraudulent pretence within the knowledge of the accused, evidence that he made similar representations to other people which were equally unfounded have been held to be admissible. You say the same principle applies here?]

Yes.

E. W. Hansell, for the respondents. There is no case in bankruptcy in which similar evidence has been admitted on a question of fraudulent preference. Before 1869 such cases were tried at common law, and the proper direction to the jury was laid down in *Brown* v. *Kempton*. (1) Since 1869 the essentials of fraudulent preference have been laid down by statute, and the question is whether the payment or delivery of goods is made voluntarily and with a view to prefer the particular creditor. It is wholly immaterial if it could be established that the debtor wished to prefer any other creditors. The sole question here is whether the debtor did the particular act with a view to prefer the respondents, and also whether he did it to get some benefit for himself. Evidence that he preferred A. is not evidence that he intended to prefer B. It is wholly immaterial. Fraudulent preference is only a question of time. If the transaction is not within the three months it is perfectly legitimate. Further, if

(1) (1850) 19 L. J. (C.P.) 169.

the evidence is admitted the Court will be trying five or six other cases of alleged fraudulent preference in the absence of the other parties.

Clayton, K.C., in reply. *Brown* v. *Kempton* (1) is not applicable to the present case: *In re Bell.* (2)

PHILLIMORE J. It is very difficult to judge a priori whether the evidence proposed is admissible or not. It may shew system as against accident, but a great deal depends on the nature of the defence whether it is admissible or not. I think that prima facie it is admissible, but I have noted the objection and will admit the evidence de bene esse.

The following facts were then proved.

Towards the end of February and in March, 1912, the debtor was in great financial difficulties and unable to meet his trade bills. In some instances he induced creditors to retire and renew the bills for one or two months, and they were not met at maturity. In other cases he induced creditors to give him cheques to pay either the whole or a part of the bills falling due and gave fresh bills which were not met. Between March 27 and April 4 he returned 300*l.* of goods to one Hertz for a bill to that amount which had not been met. In 1909 he obtained a loan of some 3000*l.* on the deposit of his wife's title deeds and her guarantee to the bank. In the beginning of March, 1912, the liability under the guarantee stood at about 1900*l.*, and the debtor subsequently sold stock, the invoice price of which was 1760*l.* and in part unpaid, to one Bernstein for 1276*l.* and paid that sum into his banking account in relief of his wife's guarantee. On April 20, 1912, the debtor told his bankers not to pay any more bills or cheques, and, paying in such moneys as he could collect, made good a breach of trust exceeding 1000*l.* that he had committed in 1898.

Clayton, K.C., for the trustee. On the evidence this return of goods was a voluntary act on the part of the debtor and was not caused by any real pressure by the respondents. The goods

(1) 19 L. J. (C.P.) 169. (2) (1892) 10 Mor. 15, 17.

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returned were not in payment of a particular debt. Their value was more than three times the amount of the two bills due.

E. W. Hansell, for the respondents. The question is what was the dominant view or motive in the mind of the debtor. The trustee in order to succeed must shew that the return of the goods was a voluntary act on the part of the debtor. If the return of the goods was not voluntary but an act done in consequence of a real, bona fide, demand of the creditor, this fact negatives undue preference and prevents the transaction from being a fraudulent preference. That was the old law prior to the Act of 1883: *Crosby* v. *Crouch* (1); *Bills* v. *Smith* (2); *In re Bird* (3); *Ex parte Tempest* (4); *Ex parte Bolland* (5); and although it was somewhat departed from in *Ex parte Griffith* (6) and *In re Bell* (7), the old law has been re-established by the judgments in the House of Lords in *Sharp* v. *Jackson*. (8) The law as to pressure is summed up in *Butcher* v. *Stead* (9) and *Sharp* v. *Jackson*. (8) Moreover, if the debtor makes an arrangement by which he reduces his debt and at the same time gets a substantial advantage for himself, that is not a fraudulent preference: *In re Arnott*. (10) Here the real demand for the return of the goods came from Millington, who pressed for a return of goods or a substantial reduction in the account, and the debtor by returning the goods reduced his account and procured an arrangement by which his bills were held and he had time to pay the balance of his account by instalments.

F. Mellor in reply.

PHILLIMORE J. In my opinion this is a question of fact which, of course, must be approached with a proper view of the law. I assume the proper view of the law to be that to constitute a fraudulent preference the debtor must be insolvent to his knowledge and the transaction must be within the statutory period, and the Court must be satisfied that the dominant or substantial motive was to prefer the creditor, and was not to obtain some advantage to the

(1) (1809) 11 East, 256, 259.
(2) (1865) 34 L. J. (Q.B.) 68.
(3) (1883) 23 Ch. D. 695.
(4) (1870) L. R. 6 Ch. 70.
(5) (1871) L. R. 7 Ch. 24, 26.
(6) (1883) 23 Ch. D. 69.
(7) 10 Mor. 15.
(8) [1899] A. C. 419, 423.
(9) (1875) L. R. 7 H. L. 839.
(10) (1889) 6 Mor. 215.

debtor, or rather, to get rid of the negative expression, that there was no substantial advantage to the debtor likely to accrue by reason of the act of preference, no escape from criminal prosecution, no escape from being declared, whether criminally or not, a trustee who had failed in his trust, no advantage which would enable him to keep afloat and carry on his business; and although in some cases a writ may be pressure, there are cases where writs are of absolutely no importance to the debtor, no terror; and in such cases I do not think that the threat of a writ, or the issuing of a writ, ought to be called pressure.

In this case I have to consider whether there was that amount of demand, that amount of insistence, or that amount of weight or sanction behind the demand, which would warrant me in concluding that the dominant motive here was not the wish to prefer the creditor but to obtain some advantage for the debtor. When I use the word "dominant" I do not mean that, if one could enter into a quantitative analysis, it would be enough if 51 per cent. could be attributed to the wish to prefer and 49 per cent. to the wish to get an advantage or to escape difficulties; but I mean that the substantial motive, the master motive, was in the direction of fraudulent preference.

That being so, my view is that this debtor had got all sorts of very special advantages from many of his creditors, and that, at the particular moment, it was rather a question which creditor had got his ear, and that a number of people were in a position to say that he would behave very badly if he became insolvent and did not pay a number of them. Those creditors who have been called before me were all in a position to say that the debtor had led them to a position which they never ought to have been led into, and had got very unusual and very undue advantages from them. Mr. Millington was the largest of these people and his complaint might have been the greatest. He was, so to speak, on the spot, and got in touch with the debtor, and he represented to the debtor how bad it would be if he did not do something for him, and that was what led the debtor to do as he did.

Coming to the details of the matter, I do not believe that the Kendal mill was overstocked, as Mr. Millington supposed. It was fully stocked, but I believe the evidence of Mr. Bond, the

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manager, that the mill could not part with any appreciable part of Millington's goods which were there without hampering the production; and I believe that to allow Mr. Millington to take away all that he chose, 75 per cent. of the goods of which bulk had not been broken, was too serious a matter to the production of the mill, and would probably have led to stoppage in production in a few weeks if the debtor had not entered into the deed of assignment of May 2. I believe that the return to Mr. Millington of these goods was parting with the materials of production at the mill to a most important extent. The debtor had been living for a very long time from hand to mouth, and the crash was very nearly coming, if not come. Mr. Millington was his largest creditor, and he thought to himself, "What can I throw to the wolves to stop their onward pursuit? I had better give back to Mr. Millington all that I can clear out of Kendal. I had better make the suggestion to him at once"; and thereupon he telegraphs, "Kendal stock too heavy" —he had no real reason to suppose that, except that it was too heavy for him to pay for—"Going to-morrow to arrange returning Swiss to you. Please withdraw bill or send cheque to meet." Then he went and saw him, and I have no doubt that between the two of them the matter was further discussed. That it could be necessary for Mr. Millington to press him to return the stock I do not agree. He had already offered to return the stock. It may have been necessary for Mr. Millington to use some sort of threat; but the threats I am convinced were threats which meant that he would expose him to other wholesale dealers in commercial quarters in Manchester and London as a man who really was not the kind of trader anybody would deal with. They were threats of that kind, in my view, and not threats of any legal action which would affect the bankrupt. As to the threat of not supplying any more goods, ex hypothesi that was of no force, because the bankrupt, so far from wishing to have any more goods, was returning them. Therefore the threats must have been in some form other than that of legal process, or presenting bills. I think that the bankrupt had very little chance of getting on. I do not think that it made any difference whether Mr. Millington presented the bill

for 300*l.* odd of March 4 and sued him on it, or whether he did not. He knew perfectly well that there were holders of bills of all kinds all round, any one of whom had only got to say "I will" to bring the whole house down. Any one creditor, of course, could serve a writ and get a judgment, if he did not proceed to execution. Directly there was an execution the whole thing was bound to topple. I do not think that he was acting to prevent Mr. Millington from bringing an action, or from presenting the bill of March 4. Even if that was so, and even if the bill of March 4 was dishonoured, that did not warrant, in my opinion, the enormous return of goods so far in excess of the amount due on the two bills. Mr. Hansell suggested, quite at the eleventh hour, that one might say that it was a fraudulent preference as to part and not as to all. But I do not think that is the way to deal with fraudulent preferences. If the case goes further the respondent will have the advantage of being able to urge that he gave some benefit. I decide this case principally on the two grounds that I believe the evidence of Mr. Bond, and I do not believe that any demand for return of goods by Mr. Millington reached the bankrupt before he sent the telegram offering to return the goods. I believe the suggestion of returning the goods came from the debtor and was made by him purely to diminish the sort of moral threat against his commercial honour which men do not like.

I also think it right to say that I should have arrived at the same conclusion in this way. I think that, when one has to look into the mind of the bankrupt, any act of his at the time or about the time, any matters in pari materia, may be looked into to see what was passing in his mind; and, though I think nothing of his replacing trust money, which to my mind stands on a higher footing, I do think that he was trying to prefer his wife and also Mr. Hertz; and if I were in doubt these facts would lead me to come to the same conclusion. I therefore give judgment for the trustee with costs.

Solicitors: *Biddle, Thorne & Co.; J. Lee Smith, for Ogden & Co., Manchester.*

H. L. F.

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Jan. 31.

[IN THE COURT OF APPEAL.]

In re ARTHUR WILLIAMS & CO.
Ex parte THE OFFICIAL RECEIVER.

Bankruptcy—Jurisdiction—Costs—Official Receiver—Unsuccessful Application by—Order to pay Costs personally—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), *ss.* 20, 105—*General Rules under the Bankruptcy Acts*, 1883, 1890, *rr.* 108, 192, 231, 262, 339.

A receiving order having been made upon a creditor's petition against a firm, it was alleged, but denied, that a certain person was a partner in the firm. The official receiver applied, under s. 20 of the Bankruptcy Act, 1883, for an order of adjudication against the alleged partner. The registrar dismissed the application and made a personal order for costs against the official receiver:—

Held, on appeal, that the official receiver in making the application was acting, not in discharge of any statutory duty, but merely in exercise of his powers under the Act, and that the registrar had jurisdiction to make the order, and in making it had not improperly exercised that jurisdiction.

In re John Tweddle & Co. [1910] 2 K. B. 697, followed.

This was an appeal from an order of a registrar in bankruptcy directing the official receiver to pay the costs of an unsuccessful application for the adjudication of Morris B. Jacobs, otherwise Joseph Morris.

On July 18, 1912, upon the petition of a creditor a receiving order was made against the firm of Arthur Williams & Co.

On July 23, 1912, W. A. S. Kettle, a member of the firm, who had surrendered to the proceedings, was adjudicated a bankrupt.

On September 17, 1912, Kettle stated upon affidavit that Morris was also a partner in the firm.

On September 23, 1912, the official receiver as the result of his investigations reported that Morris and the bankrupt, Kettle, were partners in the firm.

On September 25, 1912, the official receiver applied for an order under s. 20 of the Bankruptcy Act, 1883, adjudging Morris bankrupt.

On October 3, 1912, the matter came before the registrar, when

Morris stated on affidavit that he was not a partner in the firm, but only a manager of the business carried on by the firm.

The application was then adjourned, but came on again to be heard on November 22, 1912, when the registrar upon the evidence dismissed it, reserving the question of costs for further argument.

On December 23, after hearing counsel upon the question, the registrar ordered the official receiver to pay, personally in the first instance, the costs of Morris as from October 3, 1912, upon which date the registrar was of opinion the official receiver had elected to become a litigant.

From that order the official receiver appealed.

Sir J. Simon, S.-G., and *Hansell*, for the appellant. The registrar had no jurisdiction to make this order; but even if he had jurisdiction he has exercised it upon a wrong principle.

The official receiver in dealing with this matter was acting as an officer of the Court, and in the absence of any misconduct on his part, or of any attempt to reap a private advantage, there was no jurisdiction to order him personally to pay costs. It is a fallacy to say that because, from some points of view, he may be regarded as a party to litigation, therefore he may be ordered to pay costs.

In *In re John Tweddle & Co.* (1) it was held that in so far as the official receiver (who was there liquidator) was merely discharging his statutory duty there was no jurisdiction to order him to pay costs personally. In the present case the official receiver was distinctly discharging a statutory duty.

[COZENS-HARDY M.R. But it was also held that in so far as he had accepted the position of a litigant there was such jurisdiction.]

The first part of the decision is in favour of the appellant; and the second part may be distinguished.

In *In re Raynes Park Golf Club* (2) Wright J. said: "To visit an official receiver with an order to pay costs personally seems to me tantamount to a declaration that he has been guilty of misconduct."

(1) [1910] 2 K. B. 697.

(2) [1899] 1 Q. B. 961.

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[BUCKLEY L.J. The official receiver is not the only person who may apply for an order under s. 20 of the Bankruptcy Act, 1883.]

As a matter of practice the creditor never applies. The petitioning creditor contents himself with the receiving order. The application for adjudication is always made by the official receiver: r. 192. (1) Here the official receiver is applying as a statutory officer of the Court. His duties are defined by Part IV. of the Act, s. 66 et seq.

[COZENS-HARDY M.R. No duty is cast upon the official receiver to apply for an order of adjudication.]

He is not exceeding his duty in doing so.

[BUCKLEY L.J. Does not r. 231 of the Bankruptcy Rules (2) imply that he may be made liable for costs other than those in relation to an appeal from the rejection of a proof?]

It is not contended that under no circumstances can he be made liable for costs.

[BUCKLEY L.J. referred to r. 108 (3.). (3)]

Yes, there are other cases. In a case where, as here, he is not exceeding his duty, but is exercising a power which he undoubtedly has, he cannot be made personally liable for costs. It is not suggested that in every case where he cannot be said to be acting ultra vires he is entirely exempt from costs, but where he is acting in pursuance of a statutory authority, and no misconduct is alleged against him, and there is no other machinery in motion, he ought not to be made liable.

[HAMILTON L.J. If this principle be established creditors will never come forward to apply for adjudication, and the proceedings

(1) By r. 192 of the Bankruptcy Rules, 1886, as amended by r. 15 of the Bankruptcy Rules, 1890, "Where a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof, the Court may, on the application of the official receiver, or of any person interested, adjudge the debtor bankrupt."

(2) By r. 231, "The official receiver shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part."

(3) By r. 108 (3.), "Where an action is brought against an official receiver or trustee in bankruptcy as representing the estate of the debtor, or where an official receiver or trustee in bankruptcy is made a party to a cause or matter, on the application of any other party thereto, he shall not be personally liable for costs unless the Court otherwise directs."

will be in the hands of an official who cannot be made liable for the costs of an unsuccessful application.

BUCKLEY L.J. referred to r. 339.]

Lord Thurlow's Case (1), which was relied upon by the learned registrar, does not affect the present case.

[BUCKLEY L.J. Is not the official receiver in a similar position to a trustee who may be ordered to pay costs personally?]

He cannot be regarded as a mere trustee who is acting in a private interest.

[BUCKLEY L.J. If you can shew that the official receiver is acting in the public interest in this matter, then I agree, you may be right.]

The object of the bankruptcy legislation is to put the bankruptcy machinery in motion without delay. It is the official receiver's duty to make the application for adjudication where no creditor moves in the matter.

[HAMILTON L.J. referred to *Dyson* v. *Attorney-General.* (2)]

When a receiving order is made against a firm it is pro bono publico that adjudication should follow against all the partners as soon as possible. In order to carry out the bankruptcy process the official receiver is bound to do what is necessary to enable the Court to decide whether or no there shall be an adjudication against the parties concerned. All the forms provide for the application being made by the official receiver: Bankruptcy Forms 49—54. He is the primary person to make these applications. A proceeding of this nature is not litigation in the ordinary sense. The decision in *In re Reed, Bowen & Co.* (3) was limited to the particular instance then before the Court. *In re Ponsford* (4) shews that this application is not of a litigious nature. The official receiver was not here acting as a litigant. All that he did was to bring the matter before the Court and submit the evidence which he had obtained. His position remained the same after October 3. The registrar was wrong in saying that from that date he had assumed the character of a litigant.

Horace Fenton, for the respondent, was not called upon.

(1) [1895] 1 Q. B. 724.
(2) [1911] 1 K. B. 410.
(3) (1887) 19 Q. B. D. 174.
(4) [1904] 2 K. B. 704.

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COZENS-HARDY M.R. This is an appeal raising an important point. The question is shortly this: Has the Court, in the circumstances of this case, jurisdiction to order the official receiver to pay costs, or, if it has jurisdiction, has the learned registrar exercised the jurisdiction on some wrong principle? It cannot be disputed, of course, that under s. 105 of the Act, "subject to the provisions of this Act and to general rules, the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court."

The facts are these: There was a petition presented against a certain firm, Arthur Williams & Co., by a creditor of the firm. The petition was against the firm in the firm name, and a receiving order was made in that form. By r. 262, "a receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in the firm." That receiving order was made on July 18. One Kettle (to use what is a popular though not a legal term) surrendered and was adjudicated a bankrupt on July 23. He admitted that he was a partner. At first he said he was the sole partner, but subsequently swore an affidavit in which he said "I am not the sole partner, but I am the junior partner, and one Morris is the senior partner." The official receiver made a report setting out these facts and stating that certain creditors of the firm alleged that Morris was a partner; and on October 3 there came before the Court an application which the official receiver had made for an order of adjudication against Morris. Morris then filed an affidavit denying that he was a partner, and the matter stood over in order that the official receiver might consider it. Further evidence was adduced and there was a serious conflict of testimony, upon which the learned registrar held (and there is no appeal from his decision) that Morris was not a partner in the firm. That being so, the step which the official receiver took was to apply for an order of adjudication in bankruptcy against a man with reference to whom no receiving order had been made, and with reference to whom he, the official receiver, was really a stranger. The learned registrar, having found that Morris was not a partner, dismissed the application for adjudication, and ordered the

official receiver to pay the costs from October 3. Had he, or had he not, jurisdiction to do that? In my opinion he plainly had jurisdiction.

I do not think anything would be gained by going over the ground which I attempted to cover in *In re John Tweddle & Co.* (1) There was no difference of opinion in the Court: it was the decision of all the members of the Court. They laid down, not for the first time, I think, that where an official receiver, or an official liquidator (for this present purpose I will call him the official receiver), is simply performing duties which are obligatory upon him in a judicial, or quasi-judicial, character, he is not to be made to pay costs, because he is acting in the performance of his official duty; but whenever the moment comes when he does that which he is under no obligation to do, although he is empowered to do it if he thinks fit, and has a right to do it, then his protection as a judicial officer, or a person of a semi-judicial character, ceases, and the Court has the same jurisdiction to deal with him as with anybody else. Now applying that principle to the present case, how does the matter stand? It is quite clear from the Act and the Rules that, assuming a receiving order has been made against A. B., there are several persons who may apply for adjudication: the debtor himself, the petitioning creditor, or any creditor, and the official receiver. It is within the official receiver's power, if he think fit, to make the application, but I cannot find a trace of any obligation imposed upon him to do so. If the matter were left in doubt upon general principles, I think some of the Rules plainly imply—almost assert—the contrary. One of the duties of the official receiver is, of course, to admit or reject proofs: that is quite clear. If he rejects a proof and a creditor successfully appeals, it seems to me that prima facie he would be liable to pay the costs, if it were not for the statutory provision that in that case he shall not be so liable. Rule 231 says: "The official receiver shall in no case be personally liable for costs in relation to an appeal from his decision rejecting any proof wholly or in part." But then it is said that the machinery of the bankruptcy legislation will not work unless the official receiver

(1) [1910] 2 K. B. 697.

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does, as in ninety-nine cases out of a hundred he does, take the more or less formal step to obtain adjudication after the receiving order. That may be so, but I can find nothing to support the suggestion that in doing a thing which any one of several persons may equally well do he is doing something so much in the public interest and for the purpose of giving effect to the general policy of the Bankruptcy Act, that he should be protected as though he were acting in a judicial or semi-judicial capacity. It seems to me that where a person who is not a partner has the very serious application made against him that he should be adjudicated bankrupt, and that application is proved to be entirely wrong, it is almost shocking that the person attacked should not be able to get any costs from the official receiver who has attacked him, although it is admitted that he would get the costs if a creditor had taken the step which has been taken by the official receiver. But when it is said that the official receiver has only done an act which he was empowered to do, and which it was his duty to do towards the estate, I have not the least doubt that the official receiver, whose good faith I do not question for a moment, ought to be indemnified. So far as the facts appear, clearly he ought to be indemnified out of the estate in respect of which he was acting. He was acting in respect of the estate of Arthur Williams & Co., but that does not disentitle Morris, a perfectly innocent person, to say "I have nothing to do with Arthur Williams & Co.: I am not a partner in the firm, and why should you attack me and then claim privilege?" I think it would be dangerous to the last degree if an innocent person like this should be allowed to be attacked by the official receiver under such conditions that, if the attack should fail and it should be established that there is no justification for it, the person attacked should have to bear the costs of the proceedings.

In my opinion this case is one in which the registrar had jurisdiction to make the official receiver pay the costs. The decision was perfectly right, and this appeal must be dismissed with costs.

BUCKLEY L.J. The question in this appeal is one that is so

familiar and so well settled with reference to other jurisdictions that I confess I was surprised to learn that it was thought capable of being argued in bankruptcy. If trustees of a settlement, or executors, or administrators of a deceased person, or a receiver, or a liquidator, raise a contest with another person and bring him into Court to defend himself in respect of some claim which is set up against him, and the claim fails, the trustees, or executors, or receiver, or official liquidator, are personally liable to pay the costs. It is immaterial that in making the claim they acted bona fide in the belief that they were doing that which was for the benefit of the estate which they represented. They are personally liable as between them and the defendant; they are entitled to an indemnity out of the estate which they are representing unless they have been guilty of misconduct. The question of misconduct is not relevant at all in these circumstances as between the plaintiffs and the defendant whom they have brought into Court; it does not matter whether they have acted bona fide or not; they brought an action and failed, and they are personally liable to pay costs, but in a proper case they are, as I have said, entitled to an indemnity. But it is said that is not the position of the official receiver acting as such after a receiving order made in bankruptcy. If the distinction exists, it can only exist, it seems to me, on the footing that the act which the official receiver has done, and in respect of which he has brought the other person into Court, is an act done by him in pursuance of some statutory duty. If that were the case I agree that the result would be different. It is best illustrated by the case of *In re John Tweddle & Co.* (1), in which the distinction was plainly drawn, in a case of winding up, between acts done by the official receiver in pursuance of his statutory duty, under s. 8 of the Act of 1890, and other acts. He made a particular report with a view to leading to proceedings for a public examination, and there was a subsequent step in which, when the public examination had resulted in certain facts being disclosed, the party accused took proceedings to exculpate himself, in which case the statute provides that if such person is, in the opinion of the Court, exculpated from any charges made or suggested against him, the Court may

(1) [1910] 2 K. B. 697.

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allow him such costs as the Court in its discretion may think fit. What happened was that the official receiver appeared upon the alleged culprit's application for exculpation, resisted him, and was ordered to pay costs because he was in that respect not performing a statutory duty, but resisting a person who succeeded in shewing that he was right in his contention and that the official receiver was wrong.

It seems to me that the only question to be investigated here is whether the official receiver in making this application was performing a statutory duty. We have been told more than once that he owes a duty to the public to see that the bankruptcy law is properly administered. I am not aware of the existence of any such general duty in the official receiver. He, no doubt, owes certain duties specified by the Act of Parliament: there are certain things which he ought to do, which are more or less covered by the observations which I have made.

The only question here is whether, where a receiving order has been made against a firm, and it is alleged that a certain person is, and he denies that he is, a partner in that firm, the trial of that issue, if raised by the official receiver, is so raised by him in the discharge of his statutory duties. It seems to me plainly it is not. The official receiver comes into office by virtue of s. 9 of the Act of Parliament. Directly a receiving order is made the official receiver is constituted receiver of the property, and then the section with which we have to deal is s. 20, which provides that if certain events happen, which did happen in this case, "the Court shall adjudge the debtor bankrupt." It is said quite truly that s. 20 does not say how the Court is to be approached, but seems to treat it as if the Court will act automatically. It cannot do so; the Court must act upon the application of somebody. That somebody is defined by r. 192 and may be any one of several persons; "the Court may, on application of the official receiver, or of any person interested, adjudge the debtor bankrupt." At that moment the petitioning creditor, of course, still exists as petitioning creditor. He has succeeded in obtaining upon his petition a receiving order, but that alone will not lead to the remedies which he seeks, it is necessary to go on, unless a scheme is accepted, to obtain an

adjudication in order to reach and administer the assets. He, of course, is a person interested, and it is competent for him to apply; any other creditor is a person interested, and it is competent for him to apply; the debtor may himself apply; and it is also true that the official receiver may apply. Now in this case the receiving order had been made against the firm, and r. 262 had come into operation. That rule provides that "A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in the firm." The official receiver collected certain information and upon that he launched the proceedings in which he took it upon himself to affirm that Morris was a partner in the firm. Morris denied that. That question was litigated between them and was determined in Morris's favour. The only question is whether the costs of that litigation are costs in respect of which the official receiver is personally liable.

The Solicitor-General argued, first, that the registrar had no jurisdiction to make the order appealed from. It seems to me perfectly plain that jurisdiction exists by virtue of s. 105 of the Act of Parliament. Sect. 105 provides that "Subject to the provisions of this Act and general rules, the costs of and incidental to any proceeding in Court under this Act shall be in the discretion of the Court." This was a proceeding by the official receiver under the Act, and the costs were in the discretion of the Court. Then there are Rules made under the statute which are to be read as interpreting, enlarging, and working out the statute; and there are the plainest indications in these Rules, over and over again, that the official receiver is, in a proper case, liable for costs. I will only mention r. 108 (3.), r. 231, and r. 339. As regards the last of those, it certainly cannot be said that where an official receiver is plaintiff there is any less jurisdiction to order him to pay costs than in the case where he is defendant. Rule 339 deals with the case where he is defendant, and provides that "The following provisions shall apply to every case in which proceedings are taken, either by action, motion, or in any other manner, against any official receiver in respect of anything done or default made by him"

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and so on; and then the first sub-section is, "subject to the provisions of the next following sub-section the costs, damages, and expenses which the official receiver may have to pay, or to which he may be put under such proceedings, shall be paid out of the estate of the debtor." So that where the official receiver is brought in as defendant or respondent, that rule contemplates that he may be ordered to pay costs and to receive costs out of the estate which he represents. In this case there was certainly litigation, and what was the matter in respect of which the litigation proceeded? It was a matter in which the official receiver took it upon himself (I am assuming bona fide for the benefit of the estate) to affirm that something was a fact which was judicially determined not to be a fact. He asserted as against Morris that the receiving order against the firm was a receiving order against him because he was a partner in the firm. Morris said "There was no receiving order against me, I am not a partner in the firm," and he succeeded in establishing that fact. In that proceeding it seems to me that the official receiver was bringing in a person, a stranger altogether to the bankruptcy proceedings, as he has established before the registrar, and was asserting that a receiving order had been made, as it had not, against him; in respect of the litigation upon that issue I think the official receiver was personally liable for costs. As between him and the estate, no doubt there was no misconduct, and the proceedings were properly taken for the benefit of the estate. He may be entitled to indemnity, but that has nothing to do with his responsibility as between himself and Morris. I think the registrar had perfect jurisdiction to deal as he has done with this matter, and that this appeal must be dismissed with costs.

HAMILTON L.J. I agree that neither expressly nor impliedly can it be shewn upon the Act that the official receiver was under statutory obligation to make the application to adjudicate; and it is clear from the Rules that where the official receiver's functions involve his taking up the position of a litigant he in general does so at his own peril as to costs, and there is nothing in the Rules to relieve him of that incident in connection with such an application as this.

I would add that, to my mind, it was decided by this Court in *In re Reed, Bowen & Co.* (1) that in making an application the official receiver was in the position of a party to a litigation before a judicial tribunal. I do not think that that case is limited in its principle to the particular instance which was before the Court, namely, the right to appeal as "a person aggrieved." The ratio decidendi of the judgment of the majority was that a person authorized and entitled to ask under the Act for an adjudication is in so doing placed in the position of a party to litigation before a judicial tribunal.

I would also add that I do not think the case of *In re Ponsford* (2) is authority for the proposition for which it was cited. It does not lay down or involve that the application to adjudicate is not in the nature of litigious proceedings: it is an expression of the opinion of the Court, not necessary to the decision of the particular case, that in a proper case the Court has jurisdiction to make an adjudication without any notice to the debtor; and the discussion shews that the kind of proper cases contemplated are cases where a debtor has absconded, or has been served with an application to commit him under s. 5 of the Debtors Act, and the tribunal exercises the alternative and less drastic power of making a receiving order against him instead of committing him. Consequently that case is no warrant for the proposition that the application in the present case was not in its nature litigious. As to the suggestion that the jurisdiction to order payment of costs personally, which I am satisfied the learned registrar possessed, was wrongly exercised because he ought to have proceeded upon the principle that where the official receiver is exercising his power for the public good he ought not to be ordered to pay the costs himself in the absence of misconduct on his part, I fail to appreciate how the public good was concerned in endeavouring to shew that Mr. Morris was a partner in Arthur Williams & Co.; and I further fail to appreciate how it could be for the public good that where a man successfully defends himself against an application to adjudicate him a bankrupt he should be compelled to do so at his own expense. To say that it is for the public

(1) 19 Q. B. D. 174. (2) [1904] 2 K. B. 704.

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good that the official receiver should be protected in the discharge of his public obligations, though sound enough as a principle, appears to me to beg the question. The whole question turns on whether he was discharging his obligations, or was only exercising his powers under the Act. It seems to me clear that he was only exercising his powers, and I agree that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Solicitor to the Board of Trade; G. S. Warmington & Edmonds.*

G. A. S.

1913 *Feb.* 6.

GROVES *v.* CHELTENHAM AND EAST GLOUCESTERSHIRE BUILDING SOCIETY.

Practice—Appeal from County Court—Refusal of County Court Judge to nonsuit at Conclusion of Plaintiff's Case—Evidence subsequently called on behalf of Defendant—Appeal by Defendant to Divisional Court—Point taken that County Court Judge ought to have nonsuited Plaintiff—Consideration of all Evidence given in County Court.

At the close of the plaintiff's case in an action brought in a county court it was objected upon behalf of the defendants that there was no case for them to answer. The county court judge overruled the objection. Evidence was then called on their behalf, and the county court judge gave judgment for the plaintiff. Upon appeal to a Divisional Court:—

Held, that if the Divisional Court thought that upon the whole of the evidence given in the county court the county court judge was justified in coming to the conclusion he did, it ought not to overrule his decision, even if he was wrong in not nonsuiting at the conclusion of the plaintiff's case.

Great Western Ry. Co. v. *Rimell* (1856) 18 C. B. 575 (there entitled *Great Northern Ry. Co.* v. *Rimell*), considered.

The Court accordingly considered the whole of the evidence given in the county court and, finding that there was no evidence upon which the county court judge could give judgment for the plaintiff, allowed the appeal.

APPEAL from a judgment of the judge of the Cheltenham County Court.

The action was brought in the county court by the plaintiff,

Groves, against the defendants to recover damages for breach of an agreement dated June 14, 1910. Under the agreement the plaintiff became tenant from year to year of a certain messuage and outbuildings and certain other premises at Stow-on-the-Wold, in the county of Gloucester.

The plaintiff alleged that it was an implied term of the agreement that the defendants should keep the roof, main walls, and main timbers of the premises in tenantable repair during the said tenancy, and that they had not done so. He further alleged that by a mutual mistake of the parties the term of the agreement that the defendants should do the said repairs was omitted from the agreement, and claimed rectification of it if necessary.

At the close of the plaintiff's case it was objected upon behalf of the defendants that there was no case for them to answer. The county court judge overruled the objection and held that there was a case for the defendants to answer. Evidence was then called on their behalf, and the county court judge gave judgment for the plaintiff.

The defendants appealed.

R. A. Willes, for the defendants. The county court judge was wrong in holding that there was a case for the defendants to answer. The fact that evidence was called on the defendants' behalf after the county court judge overruled the objection does not prevent the same objection being taken on appeal, and if this Court thinks the county court judge was wrong in not nonsuiting the plaintiff, it will allow the appeal upon that ground: *Great Western Ry. Co.* v. *Rimell.* (1)

[LUSH J. I do not think that that is in accordance with the law as it stands at present. This Court must consider the whole of the evidence given in the county court.]

E. H. C. Wethered, for the plaintiff.

LUSH J. It is said that in *Great Western Ry. Co.* v. *Rimell* (1) it was held that, if on an appeal from a county court it

(1) 18 C. B. 575 (in that report wrongly entitled *Great Northern Ry. Co.* v. *Rimell*).

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appeared that the county court judge was wrong in not nonsuiting the plaintiff on an objection taken at the close of his case that there was no evidence, the Court would allow the appeal although the defendant had called witnesses whose evidence would justify his judgment. I do not think that the Court did so decide in that case although the head-note seems to suggest it, but if that was the law a change has come over the procedure, and in my judgment the law is now different. The practice is now well recognized that if a defendant, when the judge at the trial refuses to nonsuit, calls evidence, the case is not then confined to the plaintiff's evidence but also depends on that given by the defendant, and if on the whole of the evidence the county court judge was justified in coming to the conclusion he did, this Court ought not to overrule him merely because it thinks he was wrong in not nonsuiting.

ROWLATT J. concurred.

[The Court, having considered the whole of the evidence given for the plaintiff and defendants in the county court, reversed the judgment of the county court judge upon the ground that there was no evidence which justified him in giving judgment for the plaintiff.]

Appeal allowed.

Solicitors for plaintiff: *Collyer-Bristow, Curtis & Co., for Steel & Millard, Cheltenham.*

Solicitor for defendants: *W. H. Martin, for Heath & Eckersall, Cheltenham.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1913
Jan. 17.

SCHOFIELD *v.* W. C. CLOUGH & CO.

Employer and Workman—Agreement as to Compensation—Record of Memorandum—Mistake of Fact—Rectification of Register—Removal of Record from Register—Jurisdiction—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., par.* 9 (*c*), (*e*).

On the day before her twenty-first birthday a work girl was injured by accident in her employment. The employers agreed to pay her full wages (8*s.* 2*d.* per week) during incapacity, as prescribed by Sched. I. (1.), proviso (*b*), of the Workmen's Compensation Act, 1906. A memorandum of this agreement was recorded. The employers afterwards became aware that in a possible view of the law the girl was not under the age of twenty-one years at the time of the injury, and more than six months after the agreement had been recorded they sought to have the register rectified. The agreement was not obtained by fraud or other improper means:—

Held, that there was no jurisdiction either to rectify the register under Sched. II., par. 9 (*c*), by altering the memorandum, or to order the record to be removed from the register under Sched. II., par. 9 (*e*).

APPEAL from a decision of the judge of the Salford County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

On February 8, 1910, the appellant, Mabel Schofield, while in the employment of the respondents, W. C. Clough & Co., met with an accident which resulted in the loss of one of her fingers. The appellant was born on February 9, 1889, so that at the date of the accident she was in the ordinary acceptation of the term under twenty-one years of age. Her average weekly earnings were 8*s.* 2*d.*, and the respondents agreed to pay her compensation during incapacity at full wages, that being the rate prescribed by Sched. I. (1.) (*b*) of the Act in the case of a workman under twenty-one years of age at the date of the injury. (1) In

(1) The Workmen's Compensation Act, 1906, Sched. I. (1.), provides that "The amount of compensation under this Act shall be—(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding 50 per cent. of his (the workman's) average weekly earnings during the previous twelve months . . . ."

"Provided that—(*b*) as respects the weekly payments during total incapacity of a workman who is under

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February, 1911, a memorandum of this agreement was duly recorded. The memorandum contained a recital to the effect that the girl was injured on February 8, 1910, "being then under the age of twenty-one years and now under no legal disability."

The respondents afterwards became aware that in a possible view of the law a person is deemed to have attained the age of twenty-one years at the commencement of the day before the twenty-first anniversary of his birth, so that on that footing the appellant was not under twenty-one years of age at the date of the injury. They accordingly applied, under Sched. II., par. 9 (*c*) (1), to have the register rectified by striking out from the memorandum the words "then under the age of twenty-one years and now," and by altering the amount of the weekly compensation from 8*s*. 2*d*. to 4*s*. 1*d*. The county court judge made the order asked for upon the application, but, on appeal, the Court of Appeal held that, inasmuch as the parties had never agreed to compensation at the lower rate, the county court judge had no jurisdiction to make the order appealed from: see *Schofield* v. *W. C. Clough & Co.* (2)

On April 25, 1912, the respondents applied, under Sched. II., par. 9 (*e*) (1), to have the record of the memorandum removed from the register, and the county court judge made the order. From this order Schofield appealed.

J. Sankey, K.C., and *Horace Fenton*, for the appellants. This Court has already decided that the county court judge had no

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twenty-one years of age at the date of the injury, and whose average weekly earnings are less than twenty shillings, 100 per cent. shall be substituted for 50 per cent. of his average weekly earnings, but the weekly payment shall in no case exceed ten shillings."

(1) Sched. II., par. 9, deals with the registration of memoranda of agreements as to the amount of compensation under the Act, and provides:

"(*c*) The judge of the county court may at any time rectify the register; and . . . .

"(*e*) The judge may, within six months after a memorandum of an agreement . . . . as to the amount of compensation payable to a person under any legal disability . . . . has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means."

(2) (1912) 5 Butt. W. C. C. 417.

jurisdiction to rectify the register in this case under Sched. II., par. 9 (*c*): *Schofield* v. *W. C. Clough & Co.* (1) He had certainly no jurisdiction to order that the record of the agreement should be removed from the register under par. 9 (*e*), for there was no proof that the agreement was obtained by fraud or undue influence or other improper means. Moreover the application for removal was out of time; it was not made within six months after the registration of the memorandum. The agreement between the parties is correctly recorded.

Acton, for the respondents. There was never any agreement which ought to have been recorded. The parties were under a mutual mistake of fact as to the appellant's age at the time of the accident. The agreement was therefore void: *Attorney-General* v. *Ray* (2); and the record of the memorandum of a void agreement renders the register wrong in a vital particular.

There is jurisdiction in the county court judge to rectify the register by expunging the memorandum under par. 9 (*c*), even if the application under par. 9 (*e*) be out of time: *Rees* v. *Consolidated Anthracite Collieries, Ld.* (3) The word "rectify" in par. 9 (*c*) is wide enough to include what is required here: *In re National Bank of Wales.* (4) The word should have the same meaning given to it as it bore under the Act of 1897: see *Baird & Co., Ld.* v. *Stevenson* (5) and *Masterman* v. *Ropner & Sons, Ld.* (6)

[HAMILTON L.J. If what you desire to do can be done under par. 9 (*c*), of what use is par. 9 (*e*)?

COZENS-HARDY M.R. In *McKenzie* v. *Coulson* (7) James V.-C. said: "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contract. But it is always necessary for a plaintiff to shew that there was an actual concluded contrac antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument."

(1) 5 Butt. W. C. C. 417.
(2) (1874) L. R. 9 Ch. 397.
(3) (1912) W. C. Rep. 205.
(4) [1897] 1 Ch. 298, 308.
(5) 1907 S. C. 1259; 44 Sc. L. R. 864.
(6) (1909) 127 L. T. (Journ.) 7; Elliott's W. C. 509.
(7) (1869) L. R. 8 Eq. 368, 375.

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But it seems that the record in this case correctly represents the antecedent agreement.]

Here the antecedent agreement was voidable and the Court will rectify by expunging the record from the register. There has been no genuine agreement and the memorandum ought not to have been recorded.

[HAMILTON L.J. If you can get a declaration that the agreement is void, then you may be able to rectify.]

A false statement ought not to be left upon the register.

[HAMILTON L.J. also referred to *Hughes* v. *Thistle Medical Co.* (1)]

No reply was called for.

COZENS-HARDY M.R. This is a curious point, but having listened carefully to the arguments, I am unable to satisfy myself that the county court judge had jurisdiction to make the order to remove the memorandum of agreement from the register. The facts of the case are as follows: A young woman met with an admitted accident on February 8, 1910, and her twenty-first birthday was on February 9, 1910. Not being versed in the niceties of the law as to when precisely a person's minority ends and that for many purposes a person is regarded by the law as ceasing to be a minor on the commencement of the last day before his twenty-first birthday, she said, and no doubt believed, that she was under twenty-one at the time of the accident. The parties met, and without the date of her birth being concealed in any way the employers agreed to pay her 8*s.* 2*d.* a week during the continuance of the incapacity or until further order. There was an application by the girl to have this agreement recorded, and a memorandum of the agreement was registered which accurately recorded that which was in fact agreed upon between the parties.

Some time after the employers applied to have the memorandum of agreement rectified by striking out a recital that the girl was under twenty-one on the ground that she in fact was twenty-one at the time of the accident, and by altering the amount given as compensation from 8*s.* 2*d.* to 4*s.* 1*d.*, because, if she was in fact an adult at the time of the accident, she was only entitled to 50 per

(1) (1907) 44 Sc. L. R. 476.

cent. of her weekly earnings apart from some special agreement between the parties. The county court judge made an order rectifying the agreement in this way, but on an appeal to this Court we came to the conclusion that there never was an agreement fixing the weekly compensation at 4*s.* 1*d.*, and that there was therefore no ground for rectifying the agreement so as to turn it into a record of something that never had been agreed between the parties. Thereupon the present application was made by the employers to have the memorandum of agreement removed from the record. They seek to obtain this order under Sched. II., par. 9, of the Workmen's Compensation Act, 1906. That paragraph provides for the recording of agreements in a special register, and then proviso (*c*) enacts that "the judge of the county court may at any time rectify the register," and proviso (*e*) that "the judge may, within six months after a memorandum . . . . of an agreement as to the amount of compensation payable to a person under any legal disability . . . . has been recorded in the register, order that the record be removed from the register on proof to his satisfaction that the agreement was obtained by fraud or undue influence or other improper means."

A distinction has been drawn between rectifying and removing. The judge may rectify at any time so as to make the registered memorandum of an agreement accord with the actual facts and the agreement entered into between the parties. The agreements to be registered are often parol agreements, and there is nothing more natural than that the register should sometimes be found not to contain an accurate record of the actual agreement made, and that an application to bring the record into accord with the facts should be possible at any time. This rectification is, however, separate and distinct from removal. The removal of a memorandum of agreement can only be obtained within six months after it has been recorded, and then only on the grounds of "fraud or undue influence or other improper means." These are all out of the question here. The only thing alleged in this case is mistake. That may be a ground for getting the agreement set aside under the general jurisdiction of the Court, but we are here dealing with a special and peculiar jurisdiction conferred by statute on the judge of the county

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Cozens-Hardy M.R.

court, and there is no presumption that he is to have any general jurisdiction in the matter, or any powers beyond those to be found in the Act. It is impossible to read par. 9 without seeing that rectification and removal from the record are two distinct things, and if we were to say that there was power at any time under proviso (*c*) to rectify the register by removing an agreement from it we should be rendering proviso (*e*) unnecessary and absurd. The result is that the county court judge had no jurisdiction in this case to make an order for removal of the memorandum of agreement from the register, and the appeal must be allowed.

BUCKLEY L.J. Assuming that the employers establish certain facts it may be that they are entitled to relief. The question is whether, assuming that they establish such facts, they can come under this special statutory jurisdiction. I am of opinion that they cannot. This statute has established a certain register, and it is for the parties to see that it is truthful. Proviso (*c*) of par. 9 gives the judge power to rectify, that is to make the register a true and correct record, and if in order to do that it was necessary to remove an agreement from the register, he would have power to do that. Suppose, for instance, that the facts were that the parties entered into an agreement on Monday, and then rescinded it on the Tuesday and entered into another agreement, and that when they went to have a memorandum of their agreement recorded they carried in the first agreement by mistake, it would in my opinion be competent to the county court judge in such a case to rectify the register by removing the memorandum of the first agreement from it and putting the memorandum of the second upon the register. He is entitled to put the register right under proviso (*c*) so as to make it a true record of the agreement actually entered into between the parties. But proviso (*e*) of par. 9 has a different effect. Suppose an agreement was really made but that it ought to be set aside because it was obtained by some unfair means, proviso (*e*) gives then the judge a limited power for a limited time to adjudicate on that question and remove the memorandum of agreement from the register. If within six

months after a memorandum of agreement has been recorded he comes to the conclusion that the agreement was obtained "by fraud or undue influence or other improper means," he can adjudicate on the matter and have the memorandum of agreement removed from the register.

That leaves untouched the further fact that if on grounds sufficient to invalidate an agreement an application be made to the proper Court to rescind it and an order for rescission be obtained, or if the parties agree between themselves that the agreement ought not to stand, the county court judge can then purify the register and rectify it by removing the memorandum of that agreement from the register. What happened here was that the parties entered into a particular agreement on a particular footing by which the employers unquestionably agreed to pay 8*s*. 2*d*. a week, and the register contains a perfectly correct memorandum of that agreement. First the employers applied to rectify the memorandum of agreement by altering the amount of the compensation, but this Court held that that could not be done. The parties had not subsequently agreed to alter the agreement, nor had it been altered by a Court of competent jurisdiction. Now it is contended that the county court judge ought to rectify the register under par. 9 (*e*) by removing the agreement. The employers cannot have the matter put right under this particular jurisdiction, because there is no power in the county court judge to do more than rectify the register so as to make it in fact record the agreement which was actually entered into by the parties.

HAMILTON L.J. I am of the same opinion. I can only usefully add that the words "Provided that the county court judge may at any time rectify such register" are the words with which par. 8 of Sched. II. of the Workmen's Compensation Act, 1897, concluded. These words were substantially re-enacted in Sched. II., par. 9 (*c*), of the Act of 1906, but I do not see anything in the former Act to correspond with Sched. II., par. 9 (*e*), of the Act of 1906. Therefore it may be presumed that proviso (*e*) was introduced into the new Act because the power to rectify in the old Act did not confer jurisdiction to

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Hamilton L.J.

do more than merely what it said, and gave no power to deal with antecedent controversies so as to determine whether what had been recorded was actually a binding obligation. By an express provision which gives the county court judge power to determine this in certain cases within a limited time and then to remove the record of the invalid agreement from the register, the Legislature has given the strongest possible indication that the power to rectify conferred by proviso (*c*) was a power to rectify alone, and that the further jurisdiction to remove agreements which ought not to bind the parties is limited to the terms of proviso (*e*).

There is no doubt some appropriate form of action to which the employers can resort if there has been such a mistake of fact as entitles them to have the agreements declared void. In *Rex* v. *J. Templer, Ex parte Howarth* (1), Fletcher Moulton L.J. said: "I therefore look at the Second Schedule as containing the provisions which create and regulate the tribunal which is to take the place of a Court of law in regard to matters which have, in default of agreement, to be settled under the Act." Still it cannot be said that the reference to the county court is so exclusive and comprehensive that it ousts the jurisdiction of any other tribunal to do plain justice by setting right something that cannot be remedied under the statutory jurisdiction. The county court judge had no jurisdiction to make this order, and consequently I think the appeal succeeds.

Appeal allowed.

Solicitor for appellant: *A. E. Fenton, for T. A. Needham, Manchester.*

Solicitors for respondents: *W. Hurd & Son, for James Chapman & Co., Manchester*

(1) [1912] 2 K. B. 444

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.

1913

Feb. 3.

JOHNSON *v.* NEWTON FIRE EXTINGUISHER COMPANY, LIMITED.

Employer and Workman—Compensation—Practice—Award accepted and acted on—Subsequent Appeal from Part of Award—Approbate and Reprobate—Right to appeal—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II.* (4.).

A workman having sustained personal injury within the meaning of the Workmen's Compensation Act, 1906, an agreement was recorded whereby his employers admitted liability and agreed to pay compensation. A question having arisen as to the amount to be paid, the workman applied for arbitration. The employers offered to submit to an award of 12*s.* 8*d.* a week, and the learned judge awarded compensation at that rate. He also ordered the employers to pay costs up to the receipt of their submission, and the applicant to pay the subsequent costs, with a set-off. The applicant accepted the 12*s.* 8*d.* per week and the costs were taxed, but he shortly afterwards appealed from part of the order as to costs:—

Held, on appeal, that inasmuch as the applicant had accepted and acted upon the award he could not appeal against it.

Appeal from an award of the judge of the Brompton County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On August 22, 1912, personal injury by accident arising out of and in the course of his employment was caused to A. W. Johnson, a workman employed by the Newton Fire Extinguisher Company, Limited, and a memorandum of agreement was recorded in the county court whereby the employers admitted liability and agreed to pay compensation. A question arose as to the amount of the weekly compensation and Johnson applied for an arbitration on the point. He had been receiving 12*s.* 6*d.* a week and claimed 15*s.* a week. The employers offered to submit to an award of 12*s.* 8*d.* a week.

On November 19, 1912, the learned judge found that the average weekly earnings by a person in the same grade as the applicant did not exceed 1*l.* 4*s.* 9*d.*, and that if contributions paid by the employers under the National Insurance Act, 1911 (but without deciding this point), were to be reckoned as part of

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the remuneration to workmen, the applicant would not be entitled to more than the 12*s*. 8*d*. to which the employers had submitted by their answer. He therefore ordered the employers to pay to the applicant compensation at 12*s*. 8*d*. per week from November 21, 1912. He also ordered the employers to pay to the registrar of the Court for the use of the applicant his costs of and incident to the arbitration up to and including the receipt and perusal of the employers' notice of submission to an award, and that the applicant should pay to the registrar for the use of the employers their costs of and incident to the arbitration properly incurred after the date of the receipt and perusal of the submission—such costs in default of agreement between the parties as to the amount thereof to be taxed by the registrar under column B of the scales of costs in use in the county courts and to be set off the one against the other, and the balance found due from either party to the other to be paid to the registrar within fourteen days from the date of the certificate of the result of the taxation. And he further ordered that if on taxation and set-off any balance of costs were found to be due to the employers they were to be at liberty to set off such balance to an amount not exceeding 5*l*. 5*s*. against the sum of 2*s*. 4*d*. paid by them into Court and against the weekly payments payable by them to the applicant at the rate of 5*s*. per week.

The applicant accepted and received the compensation of 12*s*. 8*d*. per week, and the costs were taxed, but on December 7, 1912, he served notice of appeal asking that the order of November 19, 1912, in so far as it directed the applicant to pay to the employers their costs of the arbitration, and also the order directing that the balance of such costs found to be due to the employers should be set off and deducted from the weekly payments made by them to the applicant at the rate of 5*s*. per week, should be set aside, and for an order that the employers should pay to the applicant the costs of the arbitration and the appeal. The grounds of the appeal were stated to be (1.) that the learned judge had no jurisdiction to order the applicant to pay to the employers their costs of the arbitration; (2.) that he misdirected himself in law in ordering the applicant to pay the costs as aforesaid; (3.) that he had no jurisdiction to order the

balance of such costs to be set off and to be deducted from the weekly payments of compensation payable to the applicant; and (4.) that he was wrong in law in ordering the balance of such costs to be set off and to be deducted from the weekly payments of compensation payable to the applicant.

Horace Fenton, for the applicant. The learned judge had no power to make the order for a set-off of costs, and r. 18 (7.) of the Workmen's Compensation Rules, 1907—1911, is itself ultra vires.

W. Shakespeare, for the employers. There are the preliminary objections, first, that the appeal does not lie to this Court because it attacks the jurisdiction of the learned judge and ought to go to the Divisional Court: *Howarth* v. *Sir B. Samuelson & Co.* (1); and, secondly, because the award deals with the compensation and the costs as a whole, and the applicant has accepted and acted on it. The award is in Form 24 of the Rules, which is intra vires, and it must be treated as a whole: *Higgins* v. *Poulson.* (2) The appellant cannot say that the award is both good and bad. It has the same effect, by reason of his acceptance of it, as if it had been a consent order from which no appeal would lie: *Howell* v. *Blackwell's Executors.* (3)

Horace Fenton, for the applicant. There is no substance in these objections.

[COZENS-HARDY M.R. How can you appeal against part of the award when you have accepted the benefits given by the rest of it?]

The award is divisible. The applicant appeals from the whole of the award in order to meet these objections, although the first two grounds of appeal are not pressed. The applicant has not made any election which could deprive him of his right to appeal.

COZENS-HARDY M.R. This point is fatal to the success of the appellant. The workman has attempted to approbate and reprobate the judgment of the learned county court judge at the same

(1) (1911) 4 B. W. C. C. 287. (2) [1912] 2 K. B. 292.
(3) (1912) 5 B. W. C. C. 293.

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time. The award was made giving him 12*s.* 8*d.* per week, and the same award dealt with the costs, giving him costs up to a certain date on which the employers offered to submit to an award for the same amount as was ordered by the award. The learned judge said that inasmuch as they had then offered the amount which he thought was the right compensation he should give them their costs after that date, and, acting under the Workmen's Compensation Rules, 1907—1911, r. 18 (7.), directed that the costs should be set off one against the other. The applicant desires to contend that the learned judge had no power to do that, and that the rule is ultra vires. A preliminary objection has been taken that he cannot do that because he has accepted and acted upon the award; that he cannot approbate and reprobate. It is admitted that the costs have been taxed and that the compensation fixed by the award has been received by the applicant. The award is one entire award and it is impossible to allow him to say that part of it is good and part of it is bad. The objection prevails and the appeal must be dismissed.

BUCKLEY and HAMILTON L.JJ. concurred.

Appeal dismissed.

Solicitors: *J. Scott Duckers; Francis M. Jeboult.*

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[IN THE COURT OF APPEAL.]

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BARNETT *v.* PORT OF LONDON AUTHORITY.
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Employer and Workman—Compensation—"Average Weekly Earnings"—Casual Employment—Basis of Computation—"Grade"—Dock Strike—Strike Breaker—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.*, *s.* 1 (*b*); *s.* 2 (*a*).

By the Workmen's Compensation Act, 1906, Sched., I. s. 1 (*b*), the compensation for an injury under the Act is a weekly payment based upon the average weekly earnings of the workman during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer. By sect. 2 (*a*): "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which, during the twelve months previous to the accident, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district":—

Held, that it is for the county court judge in abnormal circumstances to decide what were the average weekly earnings of the workman, and for that purpose he is entitled to take into consideration the nature of the employment, its terms and duration, and the personal qualifications of the workman; but the question whether upon the facts found by him there are two grades or only one grade of employment may be a question of law upon which an appeal will lie.

In the first of two claims under the Act the claimant, an able seaman, who could do ship painting and rigging work, was taken on at the London Docks as an "extra casual labourer," and the next day met with an accident. In the docks labourers were divided into A labourers with permanent employment and B labourers who had admission tickets and got employment after the A labourers. Extra casual labourers had a chance of work after the B labourers and at the same rate of pay.

The county court judge held that the B labourers and "extra casual labourers" formed only one grade and awarded compensation having regard to the wages of the B labourers:—

Held (Cozens-Hardy M.R. dissenting), that the B labourers and the "extra casual labourers" formed or might form separate grades, and that the case must be remitted to the county court for reconsideration.

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In the second claim the claimant, a workman whose ordinary occupation of a meat porter had been suspended owing to a strike at the docks, obtained employment at the docks as a strike breaker, being taken on as an "extra" casual labourer each day for twelve continuous days until his accident. He was given a ticket of admission within the dock gates, but the ticket did not insure actual employment. For his first completed week he earned 26*s.* 10*d.*, and there was every probability that but for his accident he would have been continuously employed until the end of the dock strike, which lasted for some five weeks after the accident.

The county court judge took the actual earnings of the first completed week as his guide and awarded the applicant a weekly payment of 13*s.* 5*d.* during incapacity:—

Held, that the county court judge, in taking as his guide, in the abnormal circumstances of the case, 26*s.* 10*d.* as the normal wage for a normal six days, had not taken a wrong view of the law, and that the award must stand.

THESE cases were heard consecutively and decided by the same judgment.

BARNETT *v.* PORT OF LONDON AUTHORITY.

Appeal from an award of the judge of the Bow County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The question involved in this appeal was the amount of the average weekly earnings of the applicant. P. T. Barnett's regular occupation was that of an able seaman. In 1911 and until January 22, 1912, he was working as a rough ship's painter, and did rigging work and all kinds of work on board ships, and his average earnings were more than 25*s.* a week. On January 24, 1912, there being no ship in, he went to the docks and was taken on as an "extra casual labourer" and earned 4*s.* 4½*d.* On the morning of the 25th he met with an accident arising out of and in the course of his employment and received 3*s.* 1*d.* for the half-day. In the docks an "extra casual labourer" was a person taken on at a moment's notice after the men who held tickets had been taken on. There were two sets of ticket-holders—A labourers, who were (1.) permanent or (2.) registered, and B labourers, who were casual labourers but had tickets. The A men had a preference over the B men. When there was plenty of work the B men had a chance of employment and also the

extra casual dock labourers, and an extra casual labourer who was known to be a good workman was said to be sometimes employed before a B ticket-holder. B men and extras get the same rate of pay. Barnett claimed 15*s.* per week, and the respondents paid him 9*s.* a week on the ground that extra casual labourers did not on an average earn more that 18*s.* a week. The learned county court judge declined to divide the casual labourers into two grades, B and extras; he computed the wages of a casual labourer at 5*s.* a day according to the evidence as to the earnings of B labourers, and he considered that the personal qualifications of Barnett as a more or less skilled workman would tend to get him more regular employment than a casual who could only do trucking. He estimated Barnett's average at five days a week, with occasional overtime, at 25*s.* a week and awarded compensation at the rate of 12*s.* 6*d.* a week.

The Port of London Authority appealed on the grounds that the learned judge had misdirected himself as to the manner in which he calculated the average weekly earnings of the applicant; that 12*s.* 6*d.* was too much and there was no evidence to warrant such an order; that, inasmuch as the applicant's employment by the respondents was only of a casual nature and only extended over a day and a half prior to the accident, the learned judge in assessing the compensation due to the applicant should have had regard to the average weekly amount which during the twelve months previous to January 25, 1912, was being earned by a person in the same grade employed at the same work by the respondents, or by a person in the same grade employed in the same class of employment and in the same district; that he was wrong in ignoring the distinction between B labourers and extra casual labourers; that there was no evidence to justify his finding of the average amount of extra casual labourers' earnings; that he had made too great an allowance for the personal element; and that he ought not to have awarded more than 9*s.* per week.

C. B. Marriott, for the employers. The learned judge has computed the average weekly earnings of the applicant on the wrong principle. Casual dock labourers form two grades—B

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labourers and extra casual labourers. The applicant was a member of the latter grade, and his earnings cannot be computed on the basis of B earnings. Further, the learned judge has attached too much importance to his personal capacity. There is no evidence that he would be likely to get much work: *Perry* v. *Wright* (1); *Jury* v. *Owners of Steamship Atlanta*. (2)

Daniel Warde, for the applicant. The appellants are not entitled for the purpose of cutting down the compensation to divide the grade of casual dock labourers into two classes. On the evidence it is clear that they were all of the same grade. This was a question of fact for the decision of the learned judge: *Perry* v. *Wright*. (1) There was evidence on which he could compute the amount of the average earnings; and it must not be forgotten that the learned judge has had great experience of dock labourers' cases. It was right to take into consideration the personal element: *Perry* v. *Wright* (1); and Barnett was clearly above the average casual labourer.

Marriott in reply.

Cur. adv. vult.

PRIESTLEY'S CASE.

Appeal of the respondents from an award of the judge of the Bow County Court, Middlesex.

The applicant's usual occupation was that of a meat porter, but owing to the dock strike in the summer of 1912 this work ceased, and on June 5 he went to the docks as a strike breaker, was taken on as an extra casual labourer at 7*d*. an hour, and worked regularly until June 18, when the accident occurred.

During his first completed week, from June 5 to June 12, he earned 26*s*. 10*d*., and there was every probability that, but for his accident, his employment would have been continuous until the end of July, when the strike ended. According to the evidence, Thomas Stevens, also a meat porter and strike breaker, had obtained daily employment at the docks as an extra casual labourer from June 17 until the end of the strike.

The applicant was exposed to considerable risk of injury from

(1) [1908] 1 K. B. 441, 452. (2) [1912] 3 K. B. 366.

the strikers, and for this reason and because he worked satisfactorily he was given a ticket of admission within the gates; but this ticket did not insure actual employment, and unless he had been called upon afresh each day (as happened) he would not have obtained daily employment. On the King's birthday double wages were paid, and on a subsequent day the applicant earned as much as 8*s.* 3*d.* including overtime.

It appeared that there were four classes of labourers at the docks—namely, (1) permanent, who were guaranteed 28*s.*, half-pay during sickness, and a pension; (2) registered, who were guaranteed 28*s.* but no half-pay in sickness or pension; (3) B casuals, who had tickets but were not called upon until the two previous classes had been employed; and (4) extra casuals, who had no tickets and were not called upon until the three previous classes had been employed. The pay for both classes of casuals was 7*d.* per hour, and in normal times neither class had any certainty of continuous daily employment, B casuals getting about three and a half days' work per week and extra casuals less than that.

The county court judge awarded the applicant the weekly sum of 13*s.* 5*d.*, being of opinion that if the applicant had not been injured he would at the very least have earned 26*s.* 10*d.* a week, and that, in the absence of any other means of estimating the rate at which the applicant was being remunerated, that was the only guide available to him (the learned judge) in arriving at the average weekly earnings.

C. B. Marriott, for the appellants. The county court judge in taking the completed week did not take the right basis of calculation for finding the average weekly earnings, having regard to the short time the applicant had been in the employment of the appellants and to the abnormal conditions and to the ordinary wages earned by the same grade of casual labourer. The judge has not an absolutely free hand, and he must not fail to follow the directions in sub-s. 2 (*a*) of the First Schedule to the Act of 1906: *Edge* v. *J. Gorton, Ld.* (1); and the directions are explicit. It was not possible to calculate this man's rate of wages on

(1) [1912] 3 K. B. 360, 363.

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twelve days' work in the abnormal circumstances, and regard ought to have been had to a year's earnings. The normal rate of remuneration is to be taken into account, and not abnormal earnings: *Perry* v. *Wright*. (1)

The judge was wrong in holding there was no grade; the workman belonged to the grade of casual labourer: *Jury* v. *Owners of Steamship Atlanta*. (2) The continuity of the employment was due to the abnormal circumstances.

P. T. Blackwell, for the respondent. The finding of the county court judge was right. In *Perry* v. *Wright* (1) the man had been at work for only two days, and in that case the court in talking about an ordinary week meant an ordinary week in normal circumstances. In abnormal circumstances the actual is the normal, and the normal week was the week in which he was actually at work. The proviso in sub-s. 2 (*a*) has no application here. To adopt the argument of the appellants would be to bring back the state of things which the House of Lords put an end to in *Lysons* v. *Andrew Knowles & Sons, Ld.* (3)

The judge had to find out the rate at which the man was being remunerated. That rate was the ordinary rate; all grades were suspended, and the man was in the position of a man in permanent employment. The judge was right in taking the actual remuneration as the basis of calculation.

Marriott in reply.

Cur. adv. vult.

Feb. 5. COZENS-HARDY M.R. These two appeals raise for our consideration the correct mode of computing the "average weekly earnings" of a dock labourer who has been injured by an accident arising out of and in the course of his employment. Before dealing with the special facts of either case it will be convenient to consider the general provisions of the Act of 1906. [His Lordship read Sched. I., s. 1 (*b*), and s. 2 (*a*).]

As was pointed out in *Perry* v. *Wright* (1), the dominant principle is to be found in the first sentence, namely, "average weekly earnings shall be computed in such manner as is best calculated

(1) [1908] 1 K. B. 441. (2) [1912] 3 K. B. 366, 368.
(3) [1901] A. C. 79.

to give the rate per week at which the workman was being remunerated." The fact that a man who has worked only one complete week and received X wages for that period does not establish that his average weekly earnings were X. In some steady and constant employments that one week may be a sufficient test. But in many employments that would not suffice: X might be too much or too little. I desire to adopt the language of the Lord President in *Carter* v. *Lang* (1): "Supposing there is a trade in which there is an absolutely steady wage, as, for example, the case of an ordinary man employed in a shop at so many shillings weekly during the whole year, and supposing that the man had only been in the particular service two or three weeks, yet inasmuch as it was an engagement by the week, which would have lasted on to the end of the year, I think these two or three weeks or even one week would be quite sufficient to show what was the average weekly wage. But, on the other hand, where you have classes of employment which vary very much in different times, in which the wages per week would be very different at one period of the year from those of another, and in which employment is very much more abundant at one period of the year than at another, then a very much larger number of weeks might be required in order to calculate a proper average. . . . . Therefore I do not think that the question of the shortness of time being practicable or impracticable to reckon an average can be settled by a mere question of figures. It must be settled in each case by a consideration of the whole circumstances of the employment. I think that is a matter which the sheriff has got to look into and determine."

The word "impracticable," as was pointed out by Farwell L.J. in *Jury* v. *Owners of Steamship Atlanta* (2), "must mean impracticable to arrive at a fair computation, for it is never impracticable to make some arithmetical calculation with some result."

Whenever the time is too short, or the casual nature of the employment is such as to make a strict mathematical computation "impracticable" — of which the arbitrator is the judge — the arbitrator must do the best he can, and he

(1) (1908) 1 B. W. C. C. 379, 391. (2) [1912] 3 K. B. 366, 369.

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"*may*," not must, have regard to the earnings of persons in the same grade.

The word "grade" has no technical meaning. In *Perry* v. *Wright* (1) I endeavoured to express my view of its meaning. There are some industries in which grades are distinctly marked. A man steps from being a common seaman to being an A. B. or from being a bricklayer's labourer to being a bricklayer. A good workman is not in a distinct grade from an inferior workman doing the same work. Whether there is a distinct grade depends upon facts to be found by the arbitrator, although upon the facts found it may be a question of law whether they amount to or establish the existence of a distinct grade. Unless the arbitrator has misdirected himself upon a point of law, this Court ought not to interfere with his finding. Microscopical accuracy is not required, and indeed is seldom possible in computing average weekly earnings. The nature of the employment, its terms, its actual duration, and the personal qualifications of the workman may all be taken into consideration by the arbitrator.

It remains to consider the facts of each case. But there is one common feature. At the docks of the Port of London Authority there are men on the permanent staff, who may be said to be divided into two classes. Then come casual labourers—(1.) B casuals, who have tickets entitling them to be called on next after the permanent men have been employed, and (2.) extra casuals, who have no tickets and are not called on until both the permanent men and the B casuals have been employed. The pay for the B casuals and the extra casuals is identical, namely, 7*d.* per hour with overtime.

Assuming, though I am not altogether satisfied, that the casual labourers are a distinct "grade" from the permanent staff, I agree with his Honour Judge Smyly that there is only one grade of casual labourers, all of whom receive the same pay, and I do not think that the preferential right to be employed constitutes the B men a separate "grade" from the extra men. Their work and their pay are identical. There is no evidence that the system of B casuals and extra casuals prevails elsewhere than in the docks of the London Port Authority.

(1) [1908] 1 K. B. 441.

BARNETT'S CASE.

Barnett's regular occupation was that of an able seaman. He was fourteen years in the Naval Reserve. In 1911 and until January 22, 1912, he was working as a rough ship's painter and did rigging work and all kind of work on board ships, and his average earnings were certainly more than 25*s.* a week. On January 24, there being no ship in, he went to the docks and was taken on as an "extra" and earned 4*s.* 4½*d.* On the morning of the 25th he met with an accident arising out of and in the course of his employment and received 3*s.* 1*d.* for the half-day. The county court judge found that a casual labourer—not drawing any distinction between B's and extras—earns 4*s.* 8*d.* a day plus the chance of overtime. And he considered that the personal qualifications of Barnett, as a more or less skilled workman, would tend to get him more regular employment than a casual who could only do trucking.

It is obvious that the day and a half during which alone he worked was too short a period to be used for computing an average. There is no special provision applicable to the case. The learned judge estimated the applicant's average earnings at five days a week with occasional overtime, say at 5*s.* a day, equal to 25*s.* a week, and he awarded compensation at 12*s.* 6*d.* a week.

In my opinion he did not misdirect himself in point of law, and there is no ground for interfering with his award.

If, however, as the other members of the Court think, the B's and the extras are or may be separate "grades," there was misdirection. The result is that the appeal of the employers will be allowed with costs, and the case will be remitted to the learned county court judge, who will deal with the costs of the original hearing and the new hearing.

PRIESTLEY'S CASE.

Priestley's occupation was that of a meat porter. By reason of the great dock strike no meat came up and his work ceased. So on June 5, 1912, he went to the docks as a "strike breaker," and was taken on as an "extra" and worked regularly to June 18, when the accident occurred. His actual earnings during

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one complete week were 26*s.* 10*d.* His employment was continuous during the whole period. The strike lasted until the end of July, and judging from what happened to Stevens, who was taken on under precisely similar conditions, there is every probability that his employment would have been continuous until the end of July. He was exposed to considerable risk by reason of the threats of the labourers who were on strike, and it was for this reason that he was allowed a ticket of admission within the gates, though such ticket did not insure actual employment. The learned county court judge says: "If he had not been injured, I feel sure that he would at the very least have earned 26*s.* 10*d.* a week, the sum earned in his first completed week, and failing any other means of estimating the rate at which he was being remunerated, I take that as the only guide I have." In my opinion there is no misdirection and we ought not to interfere with his award. There is no "grade" of strike breakers. The circumstances were no doubt abnormal, and the problem before the learned judge was difficult, but it is not for us to challenge his computation.

In my opinion this appeal must be dismissed with costs.

BUCKLEY L.J. gave judgment as follows:—

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In my judgment there has been misdirection. The county court judge has directed himself that the B labourers and extra casual labourers are in the same grade. This I think is wrong in law. The words of the Act are "a person in the same grade employed at the same work." These two classes of persons were employed at the same work but not in the same grade. I may picture the two classes of labourers as standing on a staircase, and the question is whether the B labourer and the extra casual labourer stood on the same step or whether the one stood a step above the other. The B labourer was a person who had a ticket which entitled him to be called on before the extra casual labourer. The latter class got no work until the former class was exhausted. This was in my judgment a difference of grade. The B labourer enjoyed an advantage personal to himself which gave him a claim to employment before

the extra casual labourer had a chance. If there be preferential debts such as those detailed in s. 209 of the Companies Consolidation Act, 1908, the debt which is entitled to priority of payment may be described as not in the same grade as the debt which must take a dividend after the former has been satisfied in full. If there be preference shares and ordinary shares each is a share, but they are not of the same grade. The one is entitled to dividend in priority to the other. These are but illustrations and analogies, but in the same way the B labourer was of a grade superior to that of the extra casual labourer. If the extra casual labourer so conducted himself as that he acquired a registered ticket and became a B labourer he would have changed his grade. The award must I think be set aside and the matter remitted to the county court judge. The appellants must have the costs of the appeal.

PRIESTLEY'S CASE.

Schedule I., par. 1 (*b*), provides for two cases, the first where the man has for twelve months been employed and the second where that is not the case but he has been for a less period in the employment of the same employer. The present is the latter case. The enactment then is that he is entitled to a weekly payment not exceeding 50 per cent. of his average weekly earnings for the period (less than twelve months) during which he has been in the employment of the same employer. Sect. 2 (*a*) no doubt is expressed in terms such as might be expected if the statute had previously somewhere provided that in every case the average should be taken for twelve months. But that is not so. The average is in an appropriate case to be taken for a period less than twelve months. It does not, however, follow in my judgment that the judge is to shut his eyes to everything outside that less period. He is to ascertain the average weekly earnings for that period, but Sched. I., par. 2 (*a*), provides that the computation is to be made in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Remunerated at what date? No doubt at the date of the accident. But in no case is a man at any date being remunerated at an average. He is being remunerated at a certain definite sum,

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The statute, therefore, must mean that his remuneration at the date of the accident is to be computed as and to be taken to be an average arrived at as best calculated to give the rate required. In order to do this it may be necessary that the judge should not confine his attention to the less period referred in par. 1 (*b*), but should extend it to some longer period, not necessarily twelve months, but such as fairly to reach an average. Suppose that a man were employed in a trade in which there was work for nine months in the year and none for the remaining three months and that he had no capacity except for that trade, and suppose two cases, first, that of a man who served for the nine months in which there is work and who sustained an accident at the end of that time; secondly, that of a man who served for three months before the blank time and then for three months after the blank time, covering in all a period of nine months. The average weekly earnings computed in such manner as is best calculated to give the rate in that trade ought, I conceive, to be the same in each case. A judge would not go wrong who said that in that trade only three-fourths of the week's wages were average wages, for that in time the workman would have one-fourth of the year without employment.

Take another case. An ordinary agricultural labourer is employed during harvest time when wages are exceptionally high and hours exceptionally long, and his employment "in the employment of the same employer" is for a period of, say, three weeks. Under those abnormal circumstances a judge would not go wrong who took into account the average wages of that man as an agricultural labourer during the rest of the year or such period as he thought fair. The average week's earnings calculated as directed by par. 2 (*a*) would not be the average of the abnormally large sums actually earned, but a less sum, regard being had to the fact that during such longer period as the judge thought fair (say six months or twelve months) his earnings would be much less.

The facts here are that the man was employed for a continuous period of time, first from a Wednesday to a Saturday inclusive, then for a full week from a Monday to a Saturday, and then for two days, Monday and Tuesday, and was injured on the Tuesday. In the course of that time there was one day upon which double

wages were paid because it was the King's birthday. There was another day on which the hours were exceptionally long, fourteen hours in the day, and he earned an exceptionally large sum. The other days were substantially of even amount and gave as the rate for a normal week 26*s.* 10*d.* The work upon which he was employed was that of a casual dock labourer, but the man did that work not under normal circumstances but subject to the acceptance of an exceptionally dangerous risk. On the other hand the circumstances were such as that he was able to command an exceptionally large amount of work. Both these abnormal circumstances resulted from the fact that there was a dock strike, that there was danger to life and limb to persons who were willing to work, and that the absence of the ordinary labourers practically assured to a person who was willing to accept the risk continuous employment. There were no other persons comparable with the labourers who were working under these conditions. Under these circumstances the proviso to par. 2 (*a*), in the first place, did not, I think, arise; and, in the second place, if it did arise was not applicable because there were no persons comparable with this person to whom regard could be had. What the judge did, I think, was this. He directed himself that the circumstances were wholly abnormal. He arrived at the conclusion of fact that if the man had not been injured he would have gone on earning 26*s.* 10*d.* per week, meaning, I think, that he would have done that so long as the strike continued. How long that was likely to be was a question of fact which it was for him to answer as best he could. He disregarded the double wage on the King's birthday and the amount earned on the exceptionally long day. This was against the workman. He regarded in his favour the expectation of a large amount of work. He was entitled to do both of these and to regard the question as one of fact, which may be expressed thus: Under the abnormal circumstances in which this service was being rendered, and having regard to the uncertainty as to how long that state of things would continue, what, at the date of the accident, was the rate per week at which the man was being remunerated calculating that in such manner as is best calculated to arrive at a fair result? The answer to this question was, I think, for him.

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I cannot find that he has misdirected himself at all. Under those circumstances I think that his award must stand.

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BARNETT'S CASE.

The learned judge computes the average weekly wages in this case by taking five days a week at 5*s.*, made up as to over three days—three and a half in his note, but four according to Mr. Marriott's recollection of what he said—by employment as a dock labourer, and the excess of this, bringing it up to 5*s.* for an average week, by working as a painter and rigger.

I think there is no evidence on which he could find that the workman could average more than three days as a dock labourer. The applicant gave no such evidence, and the evidence for the respondents was that a man to whom the port authority had not given a ticket would only get three days' work per week as a dock labourer, of which only one would be in their employment, as against three or four if he had a ticket. The applicant had no ticket and was not entitled to one. It was his personal disability existing in fact, and so long as it lasted there was no evidence that he could get over three days' work a week on an average as a dock labourer. This by itself is enough to vitiate the learned judge's calculation. If, as appears to be the case, the learned judge thought that he could disregard the evidence that the respondents classed their dock labourers as B men and as extra casuals, and that this classification made a difference in fact to the work that the men could get, I think he misdirected himself. The legal meaning of the word "grade" is a matter of law; the tests by which the existence of a grade may be ascertained are matters of law; but whether a grade exists or not is a question of fact in each case. Grade or no grade does not depend on the arbitrary nomenclature of single employers apart from all other circumstances, but there may be cases where the classification adopted by a single employer, even among men whose actual work is similar, may amount to a graduation of the men in regard to conditions and regularity of employment and rates of pay so widespread and so distinct as to come within the term "grade"

as used in the Act, the similarity of the work and the identity of their generic name notwithstanding. One of such cases, and probably the typical one, would be the case of the dock authority of a port, and it must be a question of fact whether these classifications constitute grade. It cannot be said as a matter of law that they never do. In reconsidering this case I think the learned judge must take these points into account. Here, however, in any case, and whether B labourers were or were not a grade distinct from the applicant's grade, the evidence was all one way, that the acquisition of a ticket conditioned the chance of employment, and this was a fact bearing on the earnings of a person in the grade of a dock labourer in the port authority's employment that could not be disregarded. I think the appeal must be allowed with costs and the case be remitted for recomputation of the average weekly wages.

PRIESTLEY'S CASE.

The workman, having been less than twelve months in the employment of the Port of London Authority, namely twelve days, was entitled to a weekly payment not exceeding half his average weekly earnings during that time. He did earn in that time 2*l.* 19*s.* 7*d.*—26*s.* 10*d.* in the first complete six days, 29*s.* 3*d.* in the last five days. As to the latter five days, one was the King's birthday, when he got double pay, and one was the day of the accident, when he only earned 2*s.* 4*d.*; the learned judge took 26*s.* 10*d.* as the normal wage for a normal six days. I see nothing wrong in law in this. The average weekly wage was fairly and duly calculated.

If the learned judge had found this process to be impracticable, he might have had recourse to evidence of the average weekly wage of persons, other than the injured workman, employed in the same grade, but he did not find it impracticable nor was he bound to do so in law. Though Priestley's employment was that of a dock labourer, the conditions under which he was working were exceptional, so much so as to make the average weekly earnings of a dock labourer when there was no strike, an unsatisfactory measure to apply in computing the average weekly earnings of a

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dock labourer working under strike conditions. This was the learned judge's view, and I cannot see that it was wrong, and if so it was an additional reason why he should decline to have regard to such evidence, it being optional and not obligatory for him to do so. I think the appeal must be dismissed with costs.

Solicitor for appellants: *Solicitor to the Port of London Authority.*

Solicitor for respondent Barnett: *Walter H. Cowl.*

Solicitors for respondent Priestley: *W. B. Blackwell & Co.*

R. M.

H. C. R.

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Jan. 15, 26, 27, 28; *Feb.* 13.

[IN THE COURT OF APPEAL.]

WARD *v.* H. S. PITT & CO.

LLOYD *v.* POWELL DUFFRYN STEAM COAL COMPANY.

Employer and Workman—Compensation—Posthumous Illegitimate Child—Dependant—Evidence—Promise to marry—Intention to maintain—Statements against Pecuniary Interest—Knowledge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sched. I.* (*a*).

On a claim under the Workmen's Compensation Act, 1906, by a posthumous illegitimate child against the employers of a deceased workman, alleged to have been its father, for compensation as a dependant of the workman, the burden of proof of dependency is on the applicant, and evidence of statements by the deceased to the effect that he promised to marry the mother, that he intended to marry and make a home for her, that he admitted the paternity, and that he intended to maintain the child, are not declarations by a deceased person against his pecuniary interest and are not admissible as evidence to prove dependency.

THESE two appeals were heard consecutively and were decided by the same judgment.

WARD *v.* H. S. PITT & Co.

This was an appeal from an award of the county court

judge of Dudley sitting as arbitrator under the Workmen's Compensation Act, 1906.

Maria Ward, a widow, became acquainted with the deceased workman, John Burchell, in 1911, and subsequently there was intimacy between them resulting in the birth of a posthumous illegitimate daughter, the present appellant. On January 22, 1912, Burchell was killed by an accident which arose out of and in the course of his employment as a miner in Messrs. H. S. Pitt & Co.'s service. On May 17, 1912, Mrs. Ward gave birth to a female child. A claim for compensation was made by the infant by her mother as next friend on the ground that she was a dependant of the deceased.

At the trial the mother proved that the deceased workman had made gifts of money to her and that he had also sent her his house coal, i.e., coal to which he was entitled as a miner. She also proposed to give evidence that the deceased had promised to marry her and had admitted his paternity of the child. This evidence the county court judge refused to admit; and he held that the infant was the child of but not a dependant of the deceased, and that there was no evidence of an intention by him to undertake the maintenance of the child. He rejected evidence of statements made by the deceased on the ground that there was nothing to shew that such statements were, to his knowledge, contrary to his pecuniary interest, and dismissed the application. The applicant appealed on the grounds (1.) that the learned judge was wrong in law in holding that the applicant was not a dependant; (2.) that the evidence of the acts and statements of the deceased was inadmissible; (3.) that the applicant was bound to prove affirmatively the intention of the deceased to contribute to her maintenance; and (4.) that there was no evidence of the deceased's intention to maintain the applicant.

R. E. Vaughan Williams, for the applicant. The learned judge was wrong in holding that there was no evidence of dependency. The statements by Burchell that he was the father of the child and intended to marry Mrs. Ward were admissible as statements of a deceased person made against his own pecuniary interest, and they imply a promise to maintain

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the child. A posthumous illegitimate child may be a dependant and is to be treated as if it had been born before the father's death: *Schofield* v. *Orrell Colliery Co., Ld.* (1) The question whether infant children are dependants of their father is now to be treated as a question of fact: *New Monckton Collieries, Ld.* v. *Keeling* (2), although that decision did not directly refer to them. There is no presumption in law in their favour: *Lee* v. *Owner of Ship Bessie.* (3) No doubt the statements must be against the pecuniary interest of the dead man: *Tucker* v. *Oldbury Urban Council* (4); but in this case they were so. The promise to marry might be the foundation of an action for breach of promise; and the admission of paternity might have led to bastardy proceedings. Burchell must have known of these legal consequences, so *Massey* v. *Allen* (5), which was relied on by the learned judge, does not apply. There was no possibility of his statements turning out to be of any advantage to himself.

Harold Morris, for the employers. Whether the deceased workman had any intention to maintain the child is an inference of fact to be drawn from the evidence. If his statements are excluded there is no evidence of any such intention. Since the decision in *New Monckton Collieries, Ld.* v. *Keeling* (2) dependency is not a presumption of law but a question of fact. Fletcher Moulton L.J. said in *Lee* v. *Owner of Ship Bessie* (3) that the judge is bound to consider the practical value of the father's legal obligation to support his infant children, and, if there is a reasonable probability that this will be enforced in the future, must hold them to be his dependants. But there is no evidence here on which the learned judge could act, and he was quite right in refusing to admit the workman's statements. They were not really statements against his pecuniary interest, they did not completely charge him with anything; and an incomplete charge is not enough; a statement which is partly in his own favour will not do: Taylor on Evidence, 10th ed., s. 671. A statement opposed to any other than the pecuniary or proprietary interest

(1) [1909] 1 K. B. 178; [1909] A. C. 433.
(2) [1911] A. C. 648.
(3) [1912] 1 K. B. 83.
(4) [1912] 2 K. B. 317.
(5) (1879) 13 Ch. D. 558.

of the declarant will not be admitted; he must have had peculiar means of knowing the matter stated; and if a declaration is admissible the whole of it is deemed to be relevant: Stephen's Law of Evidence, 6th ed., pp. 37—39, and cases there cited. It was quite possible that these declarations might operate for the advantage of Burchell by postponing legal proceedings: *Massey* v. *Allen*. (1) At all events it is not clear that they never could be made available for his benefit and they were not made in discharge of a duty: *Smith* v. *Blakey* (2); *Sussex Peerage*. (3) To be admissible the declaration must have been against pecuniary interest at the time when it was made: *Ex parte Edwards*. (4) These were not statements of facts which Burchell had no interest to misrepresent, and that is a necessary element to make them admissible: *Gleadow* v. *Atkin* (5); Smith's Leading Cases, 11th ed., vol. ii., p. 340; *Higham* v. *Ridgway*. (6) Further it must be shewn that the statements were to the knowledge of the deceased contrary to his interest: *Tucker* v. *Oldbury Urban Council*. (7)

Vaughan Williams in reply.

Cur. adv. vult.

LLOYD *v.* POWELL DUFFRYN STEAM COAL COMPANY.

Appeal from an award of the judge of the Tredegar County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Frank Whittall was a miner in the employment of the Powell Duffryn Steam Coal Company, and on October 17, 1911, he was killed by an accident arising out of and in the course of his employment. In June, 1912, a claim for compensation was made against his employers and arbitration applied for by Alice Lloyd on behalf of her illegitimate child, Thomas Lloyd, who was born on May 15, 1912, and of whom Whittall was alleged to be the father. The learned county court judge held that the paternity was proved. The infant, by his mother as next friend, claimed compensation as a dependant of Whittall.

(1) 13 Ch. D. 558, 562.
(2) (1867) L. R. 2 Q. B. 326.
(3) (1844) 11 Cl. & F. 85, 111.
(4) (1884) 14 Q. B. D. 415.
(5) (1833) 1 Cr. & M. 410.
(6) (1808) 10 East, 109.
(7) [1912] 2 K. B. 317, 321.

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Evidence was adduced that Whittall had promised to marry Alice Lloyd, had told several people that he was going to do so, had made inquiries about a house in which to make a home for himself and her, and acknowledged that the unborn child was his. The learned judge was of opinion that he would have married the mother very shortly, that the child would have been legitimate and maintained by his father, and that he must be held to have been wholly dependent on him. The evidence on the question of Whittall's promise to marry the mother and his intention to maintain the child was objected to, but was admitted by the learned judge on the ground that the statements were made by a deceased person against his own pecuniary interest. The amount claimed was 127*l.* 8*s.* by analogy to a bastardy order, and no application was made for amendment of the claim, but the learned judge said that it was his duty to protect the infant and amend the claim, and he awarded him 150*l.* on the ground that he was wholly dependent on the deceased.

The employers appealed on the grounds that (1.) the applicant was not a dependant of Whittall; that (2.) there was no evidence of dependency; that (3.) the county court judge wrongly admitted in evidence statements alleged to have been made by Whittall; that (4.) the claim for compensation was not duly made in accordance with the provisions of the Workmen's Compensation Act, 1906; and that (5.) the judge was wrong in awarding a sum in excess of the amount claimed in the request for arbitration, the applicant having claimed only on the basis of partial dependency and no application for amendment having been made.

Atkin, K.C., and *A. Parsons*, for the appellants, adopted the argument of the employers in *Ward* v. *H. S. Pitt & Co.*, and continued: The learned judge ought not to have awarded 150*l.* to the applicants. He was bound by the ordinary rule that a plaintiff cannot recover more than he claims, even where he is an infant and wholly dependent on the deceased workman. The claim was made on the basis of partial dependence and there was no jurisdiction to alter it to total dependency. Secondly, the learned judge ought not to have admitted in

evidence the declarations made by Whittall. They were declarations in his interest rather than against it; he had no actual knowledge of the truth of them, and it was to his interest to misrepresent them: *Sussex Peerage.* (1) Many contingencies might occur; e.g., the mother and the child might die. At all events the burden is on the applicants to shew that the statements are admissible and they have not done so. There is no presumption of law that even a wife is dependent on her husband: *New Monckton Collieries, Ld.* v. *Keeling* (2); and the mother in this case cannot make a claim, for she is not married. If this decision stands much mischief will follow, as such cases will be very easy to get up and difficult to meet. No one could contradict a woman's statement that the dead man had promised to marry her. Even if the declarations are admissible, they are not sufficient evidence to prove dependency. Statements of intention cannot be accepted instead of statements of fact.

Sankey, K.C., and *Hugh Jones*, for the applicant, relied on the arguments used in the first case, and added: These declarations are admissible. A declaration may be against interest if part of it charges the maker with liability though another part discharges him: Stephen's Law of Evidence, 6th ed., p. 38. Verbal statements are as good as written statements: *Bewley* v. *Atkinson.* (3) It is only necessary that the statement should be prima facie against interest to make it receivable for all purposes: *Taylor* v. *Witham.* (4) Here the admission of paternity is admissible and it cannot be said that there was no evidence on which the learned judge could come to a decision. Dependency is now a question of fact and this Court will not interfere: *Schofield* v. *Orrell Colliery Co.* (5) The legal obligations of the father cannot be ignored.

On the other point it is clear that the learned judge had power to amend the claim and that it was his duty to do so.

Atkin, K.C., in reply.

Cur. adv. vult.

(1) 11 Cl. & F. 85, 103.
(2) [1911] A. C. 648, 654.
(3) (1879) 13 Ch. D. 283, 297.
(4) (1876) 3 Ch. D. 605, 607.
(5) [1909] 1 K. B. 178; [1909] A. C. 433.

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Feb. 13. HAMILTON L.J. read the judgment of the COURT (Cozens-Hardy M.R., Buckley and Hamilton L.JJ.) as follows:— In these two cases posthumous illegitimate children claimed by their next friends to be dependants of deceased workmen. In each case the mother gave evidence of the paternity and the learned judge found it proved. In each case, in order to prove an intention to maintain the child when born, evidence was tendered of statements made by the deceased which were alleged to be admissible as being against interest. After objection duly taken this evidence was rejected in Ward's case and admitted in Lloyd's case. In Ward's case the claim failed, and in Lloyd's it succeeded. It is no less a pleasure than an obligation to add that in each case the Court is much indebted to the arguments of counsel on both sides. The questions arising on these appeals, both as to the admissibility of such evidence and as to the evidence which is relevant and sufficient to prove dependency in favour of a child who was en ventre sa mère when the father died, are questions of great importance. Such cases constantly occur, and the facts of the present cases are typical.

First, as to the evidence of the statements made by the deceased men. In substance they are statements made by the dead man after being informed that the mother was pregnant by him, to the effect that he intended to marry her. The rule is laid down (*Reg.* v. *Overseers of Birmingham*, per Cockburn C.J. (1), and *Reg.* v. *The Governors and Guardians of Exeter*, per Hayes J. (2)) that, if the statement is admissible within this rule, all that forms an essential part of it becomes admissible, and not merely the part of it that is against interest; all incidental facts contained in that declaration, as far as they are not foreign to it, are admissible, though anything extraneous in such statements may be disregarded. It is necessary to examine the application of this rule critically, because such evidence, if admissible at all, is admissible in all proceedings against all the world, and the mother's evidence of this particular class of fact has been regarded by the Legislature as requiring corroboration in the proceedings in which it mostly arises, namely, in breach of promise of marriage and in bastardy proceedings.

(1) (1861) 1 B. & S. 763, 767—770. (2) (1869) L. R. 4 Q. B. 341, 345.

The rule as to the admissibility of such evidence laid down by Lord Ellenborough in *Higham* v. *Ridgway* (1) has often been formulated since, notably by Sir Thomas Plumer M.R. in *Short* v. *Lee* (2); by Bayley B. and Vaughan B. in *Gleadow* v. *Atkin* (3); by Bayley, Littledale, and Parke JJ. in *Middleton* v. *Melton* (4); by Lords Brougham and Denman in the *Sussex Peerage Case* (5); by Blackburn J. in *Smith* v. *Blakey* (6); in Smith's Leading Cases (8th ed., ii. 344)—as edited by Lord Collins; and by Stephen J. in his Digest of the Law of Evidence, 6th ed., p. 37.

The only doubt that arises in formulating the rule is whether the statement must be one which "never could be made available for the person himself," as Blackburn J. says in *Smith* v. *Blakey* (7), or whether it is sufficient that the entry be prima facie and in its natural meaning, standing alone, against interest, as Jessel M.R. states it in *Taylor* v. *Witham.* (8) So far as there is any real difference between them the former seems to be the better opinion.

1. It is essential that the deceased should have made a statement of some fact, of the truth of which he had peculiar knowledge. The rule applies only to statements as to "acts done by the deceased and not by third parties" (per Sir R. Phillimore in *The Henry Coxon* (9)). It does not extend to cover statements made by a deceased person of what others had told him (Tindal C.J. and Lord Campbell in *Lord Trimlestown* v. *Kemmis* (10)).

2. It is essential that such fact should have been "to the deceased's immediate prejudice," that is against his interest at the time when he stated it. If it may be construed for his interest or against it (*Massey* v. *Allen* (11)) or may only be against his interest in certain future events (*Ex parte Edwards* (12)) it is inadmissible.

3. It is essential that the deceased should have known the fact

(1) 10 East, 109.
(2) (1821) 2 Jac. & W. 464.
(3) 1 Cr. & M. 410, 423, 425.
(4) (1829) 10 B. & C. 317, 324, 326, 327.
(5) 11 Cl. & F. 85, 111, 112.
(6) L. R. 2 Q. B. 326.
(7) Ibid. at p. 332.
(8) 3 Ch. D. 605, 607.
(9) (1878) 3 P. D. 156, 158.
(10) (1843) 9 Cl. & F. 749, 780, 785.
(11) 13 Ch. D. 558.
(12) 14 Q. B. D. 415.

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to be against his interest when he made it, because it is on the guarantee of truth based on a man's conscious statement of a fact, "even though it be to his own hindrance," that the whole theory of admissibility depends. It is "a necessary element, that the subject-matter of the declaration . . . . must have been within the direct personal knowledge of the person making the declaration" (per Lord Selborne L.C. in *Sturla* v. *Freccia* (1)); "to support the admissibility it must be shewn that the statement was, to the knowledge of the deceased, contrary to his interest" (per Fletcher Moulton L.J. in *Tucker* v. *Oldbury Urban Council* (2)).

4. It has long been held that the interest to which the statement must be adverse must be a pecuniary one or, which is only a species of the same genus, a proprietary one. A statement would not be against interest if only generally criminatory; one "which might in some way or other injuriously affect the interest of the party" (per Lord Lyndhurst L.C., Lords Brougham and Denman in the *Sussex Peerage Case* (3)), or which might be prejudicial to reputation or social consideration.

The reasons given for admitting such evidence at all shew the stringency of these essential conditions. The case is exceptional, not to say anomalous. The evidence thus admitted is hearsay and the person on whose credit it rests is beyond cross-examination and is not even seen by the jury. The ground is that it is very unlikely that a man would say falsely something as to which he knows the truth, if his statement tends to his own pecuniary disadvantage. As a reason this seems sordid and unconvincing. Men lie for so many reasons and some for no reason at all; and some tell the truth without thinking or even in spite of thinking about their pockets, but it is too late to question this piece of eighteenth century philosophy.

Not unnaturally it has long been said that the rule must not be extended (see per Littledale J. in *Doe* v. *Vowles* (4) and Williams J. in *Doe* v. *Beviss* (5)). It must further be remembered that, under the general rule of evidence, the fact stated is

(1) (1880) 5 App. Cas. 623, 633.
(2) [1912] 2 K. B. 317, 321.
(3) 11 Cl. & F. 85, 110, 111.
(4) (1833) 1 Moo. & R. 261.
(5) (1849) 7 C. B. 456.

only admissible, however proved, if relevant to the issue, and that the distinction must be observed between the fact stated and thus tendered for proof, and the conclusion of fact, which might be established by inference from the fact stated in combination with other evidence. The statement is admitted or excluded according as in itself it satisfies or does not satisfy the above conditions. The mere circumstance that, if admitted, it might make some other evidence significant is no test of its admissibility.

How do these considerations affect the admissibility of the evidence in these two cases? The statements have been put forward as being statements (1.) that the deceased promised the woman to marry her; (2.) that he said that he intended to marry the woman; (3.) that he said that he was the father of the child; or (4.) that he admitted the paternity of the child.

The evidence precisely in Lloyd's case, which was admitted, is the evidence of Alice Lloyd: "He told me not to worry because we would be married in plenty of time. He had wanted to marry me before I got into that condition. I told him the child would be born in May." Then Mrs. Matilda Evans, speaking of a conversation the night before he was killed, says: "He said that Alice Lloyd had told him some things that troubled him very much but that it didn't matter because he would marry her soon enough. I asked him did he mean it, and he said, yes, he would marry her before May." Then there is the evidence of William Jones of a conversation apparently about the middle of October: "After he came back I had a conversation with him. He said 'he was afraid Miss Lloyd was in trouble—it was a case of getting married.' He asked me if I knew where he could get a house as I was working on the cottages. He wanted to work as much as he could now, to provide a home for himself and Miss Lloyd."

In Ward's case the statements were by Mrs. Hanson, the mother of Maria Ward: "I spoke to Burchell after about four months. I said she was in trouble by him, and he said 'I know she is and I am going to marry her.' I saw him on Sunday before Monday when he died. I said time to get married. He said 'If Lord spares me marry her.'"

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In Lloyd's case it is plain that from the time of the earliest statement the father knew that the date when in due course the child would be born was some seven months off. It is plain that the young woman was distressed at her condition of pregnancy while single, and that the deceased's statement to her was made with reference to that distress. His statement to Mrs. Parsons and to William Jones also had reference to the "trouble he had got the mother into" and he was "vexed" himself about it. In none was the maintenance of the child alluded to, but to Jones he addressed a question about a house, which so far referred to the child indirectly as is involved in a reference to "making a home" for himself and the mother. How are any of these statements against interest? (1.) If he promised marriage to Alice Lloyd, it was in consideration of her promise to marry him, and when there is a contract in consideration of mutual promises the law presumes, and does not inquire into, the sufficiency of the consideration. Such a promise is not against interest. The suggestion that it is against interest because the performance of the promise might lead to a pecuniary burthen is invalidated by the fact, especially important in the case of a working-class marriage, that the wife is in her sphere as much and often more the prop of the household than the husband, and in many cases is its breadwinner. Further there are weighty opinions in favour of the proposition that a statement of a contract is not itself a statement against interest, to be found in *The Queen* v. *The Inhabitants of Worth.* (1)

(2.) The statement that the deceased intended to marry the young woman was not against interest at the time when he made it. As an intention to contract to marry or actually to marry, it might or it might not be against his pecuniary interest. In this it stands on the same footing as a promise to marry. The argument was that it might be used against the deceased as corroboration in an action for breach of promise to marry or in affiliation proceedings. Nothing could be more speculative than the existence of such proceedings, yet without them his pecuniary interest could not even begin to be affected. Nothing could be further from the condition that the statement must be against

(1) (1843) 4 Q. B. 132.

interest when made. The man might perform his promise or the woman break hers. The man might fulfil his intention. The woman might marry somebody else. Either or both might die before the birth of the child. The child might die before affiliation proceedings came on. The evidence of his statement, which would prove corroboration, might not be forthcoming. Other possibilities can be suggested, but these suffice.

(3.) Viewed as a declaration that in fact he was the father of the child, I think the statement does not satisfy the conditions. It is a composite statement. It is different from the same statement by the mother. She knows and knows in whole. He knows in part and infers or believes as to the rest. He believes the young woman to be faithful—he accepts or never doubts her word. He knows her circumstances more or less; has had her under his observation more or less; can judge more or less of the likelihood or the opportunity of her having been unfaithful. That he may himself be the father he knows—that no one else can be the father he infers, accepts, or believes. I do not think that his statement "I am the father" satisfies the conditions that the fact stated is one of which he has "peculiar knowledge," or "direct personal knowledge" to the exclusion of hearsay. After extensive search I have found no case in which such a statement has been held admissible. If it were, the supposed guarantee of the truth of the statement fails, for its truth does not rest on his peculiar knowledge alone, but also on the soundness of his inference or even on pure hearsay, that is on the mother's own statement. Further, "I am the father" is obnoxious to the reply, that it is not, at the time of making it, a statement against pecuniary interest for the reasons already given.

(4.) Regarded as an admission of paternity the deceased's statement is not admissible. The only fact which the statement evidences is the state of the deceased's mind at the time of the statement, and that fact, whether it can be made relevant or not, is not necessarily against his interest. The expression of it might possibly become so in subsequent legal proceedings, but at the time it left his pecuniary interest exactly where it was. It is true that in *Ivat* v. *Finch* (1) Mansfield C.J. allowed in evidence a

(1) (1808) 1 Taunt. 141.

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statement made by a dead woman which operated as an admission against her interest, but this was a statement that she had assigned certain property and was therefore no longer its owner. Such statements by a deceased as to his tenancy or his rent are admissible as against proprietary interest, because they reduce the present quantum of interest to be inferred from occupation, which is prima facie an estate in fee simple, and so a statement that the property had been assigned operated immediately against proprietary interest. I have found no case in which the statement of a deceased has been admitted when it merely shewed an admission of liability or of facts evidencing liability in futuro, apart from the present position of the declarant and apart from any statement of a fact peculiarly within his own knowledge and relevant. Statements which would have been admissible and weighty evidence against the party making them, if he had been himself a party to the cause, were excluded in *Hyde* v. *Palmer* (1) asnot being against interest.

If the deceased's statements are not admissible in evidence what remains? The contention is that the paternity itself, which in each case was proved to the satisfaction of the judge by admissible oral testimony, carries with it a present moral obligation with such a possibility of enforcement by legal proceedings as to evidence prima facie an intention to provide for the child and so to make it a dependant. It is further said in each case that there is some affirmative evidence of such an intention independently of the deceased's statements.

In Lloyd's case this consists of the deceased's inquiry of Jones, in October, 1911, if he knew of a cottage, but this inquiry, regarded simply as something done by the deceased and stripped of all the hearsay additions about Alice Lloyd being in trouble and his own desire to make a home for her, is quite neutral, and certainly insufficient to prove or support an intention to maintain a child not expected to be born till May, 1912.

In Ward's case it consists of some letters, so little capable of being against interest that they were not read to us, of a statement as to paternity not different from those dealt with above, and of evidence that 2*s*. 6*d*. and 4*s*. 6*d*. and a load of coals were

(1) (1863) 32 L. J. (Q.B.) 126.

given by the deceased to the applicant's mother. No date is given for any of these gifts, and if made, say, in August, 1911, they admittedly prove nothing, as the woman was not then with child by the deceased. It is suggested that we ought to accept or to infer that the coals were given about Christmas, when her pregnancy was known, and that this date may be inferred from the nature of the gift and of the workman's occupation as a collier. To be sure a load of coals is more welcome as a gift at Christmas, but it is not altogether unseasonable in August, and we must go by the note of the evidence adopted by the learned judge as his own, which leaves the matter of time entirely conjectural. I think that evidence of this kind, which comes before us in so vague a shape, is of no assistance as evidence of intention to maintain the applicant. Certainly the learned judge in Ward's case committed no error in law in not being satisfied by it that the applicant had discharged the burden of proof.

It is now well settled that dependency is a question of fact to be proved by evidence and not to be presumed in law. The deceased's legal obligations present and contingent, which he must be deemed to have known, are to be taken into account to this extent, that acts done by him, colourless it may be in themselves, may acquire significance and become materials of proof, when viewed in the light of his consciousness of such obligations (see *New Monckton Collieries, Ld.* v. *Keeling* (1)). In *Schofield* v. *Orrell Colliery Co., Ld.* (2) it was proved that after the deceased had been informed that he was the father of the child the banns were put up at his expense, the wedding day was fixed, and a guest was invited. These facts, proved by evidence to which no objection could be taken, explain why it was that in that case no objection was taken to the admissibility of evidence of the deceased's statements, which in truth carried the matter no further. They were not worth objecting to and their admissibility was not discussed. Facts of such a character no doubt were materials from which an intention to make a home for the mother and child could be inferred. In the absence of evidence of things done by the deceased, which may include things said by him in those cases where dicere est agere, the legal liability

(1) [1911] A. C. 648. (2) [1909] 1 K. B. 178; [1909] A. C. 433.

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and the moral duty are not proof enough. Whatever may be said of the probable dependency of a wife as such upon her husband (see *New Monckton Collieries, Ld.* v. *Keeling*) (1)), it is too common knowledge that many men have no intention of maintaining their bastards, for any presumption to be possible. Affiliation proceedings are at best only a means of enforcing an indirect liability towards the child: the order is not an order in favour of the child, but of the mother or the guardians. In many cases proceedings cannot be taken with any hope of success: in many they are not taken even though the mother might take them. Resort to them is quite uncertain. In Ward's case the learned judge was right in not allowing himself to be guided by any legal presumption. In Lloyd's case, as soon as the deceased's statements are excluded, as they ought to have been, no evidence is left from which the dependency in fact could have been inferred. I think that in Lloyd's case the appeal must be allowed, and in Ward's case dismissed; in each case with costs here, and in the former with costs in the Court below.

Appeal in Lloyd's case allowed.
Appeal in Ward's case dismissed.

Solicitors: In *Ward* v. *H. S. Pitt & Co., W. J. & E. H. Tremellen, for Ward & Shepherd, Dudley; Ford & Ford, for Metcalfe & Lefroy, Bristol.* In *Lloyd* v. *Powell Duffryn Steam Coal Company, Bell, Brodrick & Gray, for C. W. Kenshole, Aberdare; Ward, Bowie & Co., for T. J. Thomas, Bargoed.*

(1) [1911] A. C. 648, 654.

H. C. R.

[IN THE COURT OF APPEAL.]

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1913
Jan. 24.

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Employer and Workman—Receipt of Weekly Payments—Discontinuance—Right of Employer to require Medical Examination of Workman—Refusal of Workman to submit—Suspension of Right to Compensation and to take Proceedings — Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., pars.* 4, 14, 15—*Regulations of Secretary of State, dated June* 28, 1907.

The right of an employer, under Sched. I., par. 4, of the Workmen's Compensation Act, 1906, to require a workman who has given notice of an accident to submit himself for medical examination, is not limited to one examination immediately after the accident.

A workman gave notice of an accident and, having been seen by his employers' doctors, received compensation by weekly payments for about three years. The employers then stopped the weekly payments on the ground that there was no longer incapacity to earn wages, and the workman commenced arbitration proceedings claiming compensation under the Act. The employers then required the workman to submit himself for medical examination under Sched. I., par. 4, which he refused to do. The county court judge directed that proceedings in the arbitration should be suspended until the workman had complied with the requirement of the employers:—

Held by the Court of Appeal, that there was jurisdiction to make the order.

This was an appeal from an award of the judge of the Pontefract County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On February 26, 1909, the applicant, William Major, a miner in the employment of the respondents, while working in their mine was injured by a fall of roof, his pelvis being fractured. No proceedings for compensation were taken at first, though notice of the accident was given, and there was no recorded agreement; but, by an arrangement between the parties, the respondents paid the applicant the full compensation to which he would have been entitled under the Act, namely, 17*s.* 4*d.* a week, from the date of the accident until July 10, 1912, except that for a short time during that period they gave him

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light work with reduced compensation. Upon his proving unable to do the light work, however, the payment of the full compensation was resumed.

At the time of the accident the workman was examined by the respondents' doctors, and during the time that he was receiving compensation was periodically further examined by them.

On July 10, 1912, he was again examined by the respondents' doctors, who reported that the injury had ceased to have any present effect upon his wage-earning capacity. Thereupon the respondents ceased making the weekly payments, and on September 25, 1912, the workman applied for an arbitration under the Act, claiming compensation from July 10, 1912.

On October 17, 1912, the respondents required the applicant to submit himself to medical examination at their expense, which the applicant refused to do.

By their answer to the claim the respondents denied liability on the ground of the applicant's refusal to submit to medical examination, and pleaded alternatively that the applicant's incapacity for work had ceased to be total prior to his compensation payment being stopped.

The county court judge held that the request of the respondents was reasonable and made at a reasonable time, and had been specifically refused by the applicant; and he directed that further proceedings should be suspended until the medical examination had taken place as provided by Sched. I. (4.) (1) of the Workmen's Compensation Act, 1906.

The applicant appealed.

(1) By Sched. I. (4.), "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and, if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceeding under this Act in relation to compensation, shall be suspended until such examination has taken place."

By paragraph 14, "Any workman receiving weekly payments under this Act shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall

Atkin, K.C., and *Adshead Elliott*, for the appellant. Paragraph 4 of Sched. I. provides for one examination at the outset immediately after notice of the accident, and only then. Paragraph 14, on the other hand, provides for the case of a workman receiving weekly payments, and says that he shall "from time to time" submit himself. Where an employer has had the workman examined medically under paragraph 4, and has admitted liability and paid compensation in the form of weekly payments, he is not entitled to stop the payments and then require a further examination of the workman under paragraph 4.

[BUCKLEY L.J. The man is instituting fresh proceedings for an arbitration under the Act; why does not paragraph 4 apply?]

Because paragraph 14 applies and recourse cannot again be had to paragraph 4.

[HAMILTON L.J. Paragraph 15 seems to contemplate examination at intervals both under paragraph 4 and paragraph 14.]

Under paragraph 4 there can only be one examination. Under paragraph 14 the employer may require the workman to submit to examination from time to time while he is paying weekly compensation. The learned county court judge thought that the regulations as to examination at intervals applied to paragraph 4. That is not so; paragraph 4 only refers to the preliminary examination to be made immediately after the accident.

Bairstow, K.C., and *R. A. Shepherd*, for the respondents. The Act gives no right to the employer to compel the examination of the workman; it only imposes inconvenient results upon the workman in case of his refusal to submit himself for examination.

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be suspended until such examination has taken place."

By paragraph 15, "A workman shall not be required to submit himself for examination by a medical practitioner under paragraph (4.) or paragraph (14.) of this schedule otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations."

By the Regulations of the Secretary of State, dated June 28, 1907, "1. Where a workman has given notice of an accident or is in receipt of weekly payments under the Act, he shall not be required to submit himself, against his will, for examination by a medical practitioner provided by the employer except at reasonable hours."

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Paragraph 14 deals only with the normal case of a workman receiving weekly payments under the Act. Where an employer without any award makes weekly payments at the rate prescribed by the Act, those are not weekly payments under the Act. Paragraph 14 does not apply to such a case as this. Paragraph 4 applies to every case not coming within paragraph 14. There is no overlapping. The object of both paragraphs is to enable the employer to have a medical examination.

Paragraph 4 provides that the workman shall "submit himself for examination"—not "an examination." It does not say that that shall be once and once only. It is consistent with there being more than one examination. The words "From time to time" which occur in paragraph 14 are not necessary in paragraph 4.

The fact that a workman has been examined voluntarily, no matter how many times, does not affect the right of the employer to require him to be examined under paragraph 4.

That there may be more than one examination under paragraph 4 is shewn by paragraph 15.

Adshead Elliott in reply. The object of the examination under paragraph 4 is to enable the employer to test the case at the outset, and before any compensation has been paid. Where an employer, after notice of an accident, pays compensation he thereby waives his right to require an examination under paragraph 4. When once he has brought himself under paragraph 14 he cannot revert to paragraph 4.

COZENS-HARDY M.R. This appeal raises a point which is new, and I desire to express my obligation to counsel on both sides for the way in which they have assisted us in construing some very difficult sections of this very difficult Act. The question really turns upon the circumstances under which a workman is under obligation to submit to an examination by a medical man at the cost, and, of course, at the request, of the employer. Before discussing the sections I think it will make it quite clear if I state what are the facts upon which our decision depends. [His Lordship stated the facts, and continued:]

The claim came before the learned county court judge, and he, acting under sections which I shall refer to at once, has

in effect suspended the proceedings until the workman submits to examination by an expert. It has been urged by counsel for the appellant that the learned judge had no jurisdiction to make any such order. That involves the consideration of two or three paragraphs of the First Schedule to the Act. The 4th paragraph is: "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid for by the employer, and, if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation, and to take or prosecute any proceedings under this Act in relation to compensation, shall be suspended until such examination has taken place." The employers say "We come exactly within that paragraph. Notice was given of the accident. We required him to submit himself for examination by a medical practitioner. He refused to submit himself, and therefore we ask the Court to say that his right to take or prosecute any proceedings must be suspended. The proceedings which he has taken must be suspended, and the order must prevent him from taking any further proceedings until he has submitted himself for medical examination."

It is said in answer that that only applies to one examination at or immediately after the time of the accident. I am unable to assent to that view. It seems to me that unless we are compelled to come to such a conclusion common sense indicates very strongly the opposite view. Take a simple case. There is an accident, and notice is given. The employer, if he is wise, will desire at all events to have an examination immediately after the accident. The claim may be suspended,—I do not say for how long—but it may not be made immediately after the notice, and the vital point in the case may be, what is the condition of the man at the date when the claim is made? How can that be ascertained if the employer is limited to one examination immediately after, or substantially immediately after, the accident has taken place? For reasons which I shall refer to later on I think that contention is wrong, and I do not arrive at my conclusion from merely reading paragraph 4. Then we come to paragraph 14, and in order to understand that paragraph it is important to remember what is the

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position of a workman who has obtained an award in his favour providing for the payment of compensation, or who has a recorded agreement for compensation, which has for most purposes the effect of an award. The workman is in the position of a judgment creditor; the employer is in the position of a judgment debtor, and without taking any further independent proceedings, without suing upon the agreement or upon the award, he can levy execution upon the award or upon the recorded agreement, and that being so, if the judgment debtor desires to escape from the exigencies of his position, and to prevent the workman making a levy upon him, he has to apply to review the weekly payments under the award or under the recorded agreement. That is under paragraph 16, and in order to assist in the operation it is provided by paragraph 14 that "Any workman receiving weekly payments under this Act"—which I read as meaning any person entitled under this Act to be in the position of a judgment creditor against a judgment debtor—"shall, if so required by the employer, from time to time submit himself for examination by a duly qualified medical practitioner provided and paid by the employer. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to such weekly payments shall be suspended until such examination has taken place." That is to say, although he has got a judgment, or what is equivalent to a judgment, when he has placed himself in the position of being a judgment creditor, if, under those circumstances, he does not submit himself for examination, his right to levy execution will be suspended; in other words I think paragraph 14 applies to the case where the relation of judgment creditor and judgment debtor exists, and paragraph 4 applies to the case where that relation does not exist.

Then it is said that paragraph 14 specifies a right to have periodical examinations "from time to time," and we do not find those words in paragraph 4. That is quite a true observation, but then we must look at paragraph 15: "A workman shall not be required to submit himself for examination by a medical practitioner under paragraph 4 or paragraph 14 of this schedule otherwise than in accordance with regulations made by the

Secretary of State, or at more frequent intervals than may be prescribed by those regulations." That seems to me to shew that under paragraph 14, and also under paragraph 4, there may be more than one examination, because "more frequent intervals may be prescribed," and there is no ground for limiting those words of paragraph 15 to paragraph 14; in fact I cannot read it in that way. As far as regards the examination under paragraph 15 it is not to be "at more frequent intervals" than may be prescribed by the regulations of the Secretary of State. Turning to the Regulations of June 28, 1907, they say, first, that the examination must be at reasonable hours—nothing turns upon that. Then (2.) "A workman in receipt of weekly payments shall not be required, after a period of one month has elapsed from the date on which the first payment of compensation was made, or if the first payment is made in obedience to the award of a committee or arbitrator, from the date of the award, to submit himself, against his will, for examination by a medical practitioner provided by the employer except at the following intervals:—Once a week during the second, and once a month during the third, fourth, fifth, and sixth months, after the date of the first payment or the award, as the case may be, and thereafter once in every two months." That being so, it seems to me that this case really comes under paragraph 4. The view which I have suggested is substantially the view which was taken by the learned county court judge. I think in this case the workman is not entitled to proceed with this application unless and until he submits himself for examination by a doctor employed and paid by the employer. That being so, this appeal fails and must be dismissed with costs.

BUCKLEY L.J. Paragraphs 4 and 14 of the First Schedule of the Act of 1906 deal in my judgment with different subject-matters. Each paragraph deals with a certain set of facts; as to that with which the fourth paragraph deals the fourteenth is silent. There is no question of any overlapping; the two paragraphs deal with different states of fact. Paragraph 4 deals with this state of facts: the workman has given notice of an accident and says that he has a right to compensation; he has taken or prosecuted

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or seeks to take or prosecute proceedings in relation to that compensation; he is asserting a legal right to something and it is in litigation, if litigation is the right word, under this Act; it is in dispute between him and his employer whether he has or has not the right to compensation under the Act. Paragraph 14 deals with a totally different state of facts. For the purpose of paragraph 14 you must take it that it has been either admitted or established that the right to compensation has resulted in a certain weekly payment which is due from the employer to the workman. The workman is not merely asserting a right of action; he is enjoying the fruits of his right having been admitted or established; there has been created a debt, a periodical debt, due from the employer to the workman. In this latter case the employer, who is from time to time to be a debtor in respect of the sum which has been established, has by paragraph 14 the right to a periodical examination of the recipient of the money in order to ascertain whether the medical facts have altered or not.

I pass over paragraph 14 by saying that that is a paragraph which has no reference to the facts of the present case. This man is not receiving any weekly payments under this Act. The question which is in dispute between him and his employers is whether he is entitled to receive any weekly payments or not. The accident occurred in February, 1909. I am not going to concern myself with what took place down to September 25, 1912. On September 25, 1912, process was issued in the arbitration with which we are now concerned. At that date the man was receiving nothing. His case was that he was entitled to receive something. He was advancing what paragraph 4 calls "his right to compensation" and he was proceeding to take or prosecute proceedings in relation to that compensation. In that state of facts his employers required him to submit himself for examination. He refused, and the learned county court judge has held, he having so refused, that under paragraph 4 he was bound to make an order suspending the proceedings in relation to his compensation until the workman had complied. The question before us is whether that is right; in my opinion it is right. It seems to me that paragraph 4 is applicable in every case in

which the workman is advancing and seeking to sustain against the employer the right to compensation. It does not matter whether he has done it before or not, if he has done it once and something has ensued from that, and he makes some renewed application asserting that there resides in him this legal right, it seems to me that paragraph 4 applies assuming the condition precedent is satisfied and he has duly given notice of his accident; so that there is a proceeding in which he says "I aver and you deny that I have right to compensation." It appears to me that under those circumstances the employer is entitled to say "Then submit to the examination in order that I may see whether you can sustain your case." The argument we have heard is an argument which seeks to introduce into paragraph 4, somehow or other, the word "once" or "one." "Submit himself for examination" it is said means "submit himself for one examination and no more." As a matter of English that does not seem to me to be right; "submit himself for examination" means "submit himself to a certain proceeding." I may express the same thing otherwise by saying that the argument seeks to introduce certain words making the paragraph read "shall if so required by the employers *once* and *once only* submit himself for an examination," but the paragraph does not say so. To my mind it is clear it does not mean that. What it means is that in any case where there arises a contestatio as to whether there is a right to compensation or not then paragraph 4 applies and the man is told he must if so required submit to examination, otherwise the right to compensation which he seeks to obtain is to be suspended until he does so submit himself. I may add, although I do not rest my judgment upon it, that as a matter of fact the man had never before under paragraph 4 been requested to submit to medical examination, though he had been examined from time to time; his employers' medical man had examined him, but he had never been desired to submit. I expressly desire, however, to say that I do not rest my judgment upon that. I think that even if that had taken place, and then there had arisen a new question in dispute between him and his employers as to whether he had or had not a right to compensation, then paragraph 4

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would have applied. I may say that this view of the proper construction of the paragraph seems to me to be not merely borne out by, but made plain by, paragraph 15, which provides that the workman "shall not be required to submit himself for examination by a medical practitioner under paragraph (4.) or paragraph (14.) of this schedule otherwise than in accordance with regulations made by the Secretary of State, or at more frequent intervals than may be prescribed by those regulations." I cannot read those words "more frequent intervals" as referring to paragraph 14 to the exclusion of paragraph 4. If they had not been intended to refer to paragraph 4 it would have been so stated. Those words "more frequent intervals" seem to me to be addressed to both cases. For these reasons I think that the order of the learned county court judge is quite right and the appeal must be dismissed.

HAMILTON L.J. I also think the order of the learned county court judge was right. The workman in this case has found it to his advantage to take or prosecute proceedings under this Act after September 25 last year. The learned judge had the contention raised before him in bar of those proceedings that the workman was then required to submit himself for examination and had refused, and he was satisfied of that. I will assume what is not found by the learned judge, nor does it follow necessarily from the evidence given, that the occasion on which he refused to be examined was not the first occasion on which he had been required by the employers to be examined. The question is whether the learned judge had the right under paragraph 4 of the First Schedule to hold that that refusal constituted a bar to and a suspension of the proceedings then commenced. I think he was right upon the construction of paragraph 4 alone. The words "where a workman has given notice of an accident" have been held to be words which cause this provision for the benefit of the employer to be one of which he can avail himself at the earliest possible moment and from the earliest time at which notice of the accident is given. It is not a condition precedent to the right of the employer to require examination that

the workman should have given him notice; on the contrary, if the workman has given no notice to the employer, and the employer has waived that obligation and has allowed the arbitration proceedings to go on, it has been held in *Osborn* v. *Vickers, Son & Maxim* (1) that he still enjoys his right of requiring an examination without being prejudiced by the workman's failure to give notice. Accordingly the first words date back the right of the employer to require examination to the earliest possible moment at which the examination may be useful and necessary in the case. What other words are there which in any way indicate that the right is not to be enjoyed at the last possible moment at which it may be necessary, or on more than one occasion? Obligations are imposed on the workman to submit himself for examination, and if he does not submit, then his right to prosecute proceedings under the Act is suspended, and even if he subsequently amends his ways he loses his right to payment during the interval of recalcitrancy. Why is it to be said that the words "he shall submit himself for examination" must be construed "shall submit himself *once* for examination"? There is nothing in the nature of things to compel us to say so, because in many of these cases where the medical evidence upon the results of an accident is conflicting, or the medical questions raised are difficult, the problem can only be solved by repeated examinations, and by keeping the workman from time to time under observation.

It would therefore frustrate a large part of a provision which was for the benefit of the employer if this right were to be exhausted by one requirement, which in the ordinary course will take place at an early date and in many cases may only result in nothing without a subsequent examination. It is truly urged by counsel for the appellant that medical examination imposes a burden upon the workman, from which he may require some protection. Some examinations are disturbing to a person whose health is impaired; some cause pain in the process of examining how far he is recovering from his injury; some may be distressing to the sense of modesty; but against any harassing the Legislature has provided a separate protection

(1) [1900] 2 Q. B. 91.

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for the workman in the form of regulations to be made by the Secretary of State, which it considered correlative to the advantage given to the employer by the right of having a medical examination. I think, therefore, unless it may be found otherwise in the words of the Act itself or in some part of the Act itself, that paragraph 4 implies, and the scheme of the Act implies, as a matter of sense, repeated requirements for examination. The first words of paragraph 15 seem to me to be conclusive that the Legislature contemplated examinations at intervals under paragraph 4 as well as under paragraph 14, for the reasons stated by the Master of the Rolls. The argument, however, is that paragraph 14 on its true construction shews that either paragraph 4 implies one examination only, or at any rate has in many cases virtually that effect, because, as it is said, when paragraph 14 has once come into effect there can be no further recourse to paragraph 4, and if the employer has the right to have examinations from time to time under paragraph 14, he has no other such right under any other paragraph. I am unable to accede to that argument. Again assuming, what I do not think is the case, that paragraph 14 could be applied to this case, it does not appear to me that the workman could be said to be a workman receiving weekly payments under this Act. Paragraph 14 speaks of "receiving payments under this Act" and "his right to such weekly payments shall be suspended." That refers to payments which are made under some registered agreement or under an award made under the Act, and is not really applicable to the present case, where the payments were not so made. It is true that payments were made under a voluntary arrangement and that when the employers ceased to carry it out the workman was thrown back on his remedy by taking or prosecuting the proceedings in question. The words in paragraph 14 are necessary in order that in the case where a man has a right enforceable by proceedings in the nature of execution his refusal to submit to examination may be visited by a penalty analogous to the penalty in paragraph 4. If paragraph 4 had stood by itself without paragraph 14, the penalty might have been nugatory in the case of a man receiving weekly payments under the Act, because the suspension of the right

to take or prosecute any proceedings under the Act would have no terrors for a man who had already got an award or registered agreement for weekly payments, as to which he no longer needed to assert the right to compensation. He could set up a claim in the nature of a judgment creditor's claim; he would have no need to prosecute any proceedings, but would simply exercise his right to issue execution. Therefore it was that, as a separate matter from paragraph 4, paragraph 14 was inserted to apply the penalty of suspension to the case of a workman who is receiving weekly payments. In my view the words "receiving weekly payments" mean payments to a man who up to the moment of his refusal is getting week by week the money paid into his hand, but it also refers to a man who, whether receiving it in money or not, is entitled to receive it under some enforceable right. That I think is shewn by the circumstance that in paragraph 15 the Act itself speaks of the case of a workman "in receipt of weekly payments," obviously referring to paragraph 14, obviously therefore using those phrases as identical phrases and providing its own interpretation of the words "workman receiving weekly payments." I think it could not be successfully contended that "a workman in receipt of a weekly payment," which is an expression descriptive of the workman, is confined to a workman who gets week by week a sum of money and does not apply to a workman who is entitled to get week by week a sum of money, although through some dispute or carelessness he has not actually received it. In that case his right to receive it may be vindicated by issuing an execution. That I think is an answer to the suggestion that you must not so construe paragraph 14 and paragraph 4 as to enable an employer to revive the rights given in paragraph 4 by the simple process of failing to carry out an obligation under paragraph 14. I think that no argument can be drawn from paragraph 14 limiting the right given under paragraph 4 to the occasion of the workman taking or prosecuting his proceedings after he has for some time been receiving weekly payments. Supposing that he has been required to submit already and that he has submitted to examination, I see no reason why his right to take proceedings should not be suspended if he is again required to submit himself for

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examination, and in fact refuses, as the learned judge has found he did in the present case. I think, therefore, the order appealed against was right.

Appeal dismissed.

Solicitors: *Corbin, Greener & Cook, for Raley & Sons, Barnsley; Vincent & Vincent, for Day & Yewdall, Leeds.*

G. A. S.

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[IN THE COURT OF APPEAL.]

HARWOOD *v.* WYKEN COLLIERY COMPANY.

Employer and Workman—Injury by Accident arising out of and in the Course of Employment—Incapacity—Supervening Infirmity not due to Accident—Right to Compensation not affected.

A workman who has brought himself within the provisions of the Workmen's Compensation Act by proving that he has sustained personal injury by accident arising out of and in the course of his employment, and that incapacity has resulted from the injury, is not disentitled to compensation under the Act by reason of some supervening infirmity, not due to the accident, which has equally resulted in his incapacity.

APPEAL from an award of the judge of the county court of Warwickshire holden at Coventry, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was a miner fifty-nine years of age. On October 28, 1909, he was injured by a fall of coal whilst working in the respondents' mine, the injuries consisting of two broken ribs and a lesion of the right knee.

The respondents admitted liability for the accident and paid the man half his wages during his incapacity for work up to February 28, 1910, when they found him light work upon the surface at his old wages.

On October 20, 1911, whilst working on the pit bank he had another accident by which he again injured his right knee.

The respondents again admitted liability and paid compensation until May 20, 1912, when, acting under the advice of their

medical men, they ceased to pay compensation on the ground that the man had recovered from the effects of the first accident and that no incapacity remained as a result of the second accident.

In June, 1912, the workman commenced arbitration proceedings claiming compensation from May 20, 1912. At the hearing before the county court judge it appeared from the medical evidence that the man was suffering from heart disease, which was first noticed by the doctor in April, 1912. There was some conflict of evidence as to whether the inability to work was due more to the condition of the heart than to the effects of the accident, and whether the condition of the heart was in any way connected with the accident. Upon the evidence the learned county court judge came to the conclusion that the applicant was disabled from work both by reason of the accident and also by reason of the heart complaint, which heart complaint was not caused by the accident, but was an independent matter. In the course of his judgment the learned judge said: "When I say that the man is incapacitated from work by heart disease and by the accident, that may mean one of two things. It may mean that he is incapacitated by the joint operation of the accident and the heart disease, or it may mean that he is incapacitated by both causes each independent of the other, each operating if the other did not exist. It is in the latter sense that I find he is incapacitated by both these causes. I find he was incapable of doing any but light work owing to the accident, and that he is also incapable of doing any but light work in consequence of the heart disease. If there had been no accident at all, he would still be incapacitated for work as a miner or banksman. I am of opinion that there is no work which since May 20, 1912, the accident has prevented him from doing which the heart disease would not also have prevented him from doing."

On these facts judgment was given for the respondents.

The applicant appealed.

Hugo Young, K.C., and *R. A. Willes*, for the appellant. When a workman has established incapacity due to an injury by accident arising out of and in the course of his employment his

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employers cannot avoid liability by proving that the workman is also incapacitated by a disease which is not the result of the injury. By Sched. I. (1.) (*b*) the weekly payment is to be made during the incapacity resulting from the injury. If the judgment appealed against be right, then it would seem to follow that where a man who is receiving compensation in respect of an injury by accident subsequently contracts an illness which would have incapacitated him even if there had been no accident then his right to compensation in respect of the injury is gone.

Sched. I. (3.) shews how the amount of the weekly payment is to be fixed. It is not limited to what the workman is prevented from earning by reason of the accident. Paragraph 17 of Sched. I. provides for the redemption of weekly payments; but if the learned county court judge is right no employer would seek to redeem, because there would be the chance of the workman becoming incapacitated by illness apart from the injury by accident and so putting an end to his right to compensation altogether. There is no evidence that the incapacity arising from the injury and that arising from the heart disease were co-extensive. This case is not precisely covered by the decision in *Cory Brothers & Co.* v. *Hughes* (1); but there, upon an application by the employers to terminate the weekly payments, it was proved, as here, that the heart disease from which the workman was suffering was not due to the accident, and it was held that the employers were not entitled to succeed.

[COZENS-HARDY M.R. That case does not cover the point before us.]

In *M'Callum* v. *Quinn* (2), which was an application for a review on the ground that the workman was unable to work in consequence of a cardiac affection, Lord Pearson says, at p. 229: "I think it rests upon the employer to prove (1.) that the supervenient cause was not connected with the original injuries, and (2.) that the original injuries have ceased to operate as an effective cause of incapacity." That applies to this case. See also *Lee* v. *Baird & Co.* (3)

(1) [1911] 2 K. B. 738.
(2) 1909 S. C. 227; sub nom. *Quinn* v. *M'Callum*, 46 S. L. R. 141.
(3) (1908) 1 B. W C. C. 34.

Sanderson, K.C., and *P. E. Sandlands*, for the employers. There is no authority directly in point. Here the Court has to consider the state of things at the time the workman makes the application. The workman has to prove three things: (1.) that the injury arose out of the employment, (2.) that it arose in the course of it, and (3.) that he is suffering from an incapacity for work, i.e. an inability to earn wages. As it is put by Lord Macnaghten in *Ball* v. *William Hunt & Sons* (1), "Incapacity for work is a compendious expression meaning inability to earn wages or full wages as the case may be at the work in which the injured workman was employed at the time of the accident."

Here the question is whether the incapacity for work arises from the accident or from the heart disease, and the learned county court judge has found that it arises as much from one as from the other, and he has rightly held that the workman is not entitled to compensation.

Cory Brothers & Co. v. *Hughes* (2) does not apply. That was an application for a review, and the onus of proof was upon the employers. The case is entirely different where the workman is applying on the ground of incapacity for work. The onus is then upon him to shew that the incapacity is due to the accident, an onus which he cannot discharge in this case, because it is found that the incapacity is equally due to the heart disease. It was not shewn in *Cory Brothers & Co.* v. *Hughes* (2) that the incapacity from the heart disease was co-extensive with that caused by the accident. There, too, there was work which the heart disease would not have prevented him from doing, and which he could have done had it not been for the accident. It was clear, therefore, that the accident was causing the man some loss.

Employers ought not to be held liable to compensate for a workman's inability to earn wages where from a cause unconnected with the accident the man is incapable of earning wages.

The applicant has to shew that he is suffering from an incapacity arising from the injury. This he has failed to prove. He is in such a state of health that even if there had been no accident he would not have been able to earn wages.

(1) [1912] A. C. 496, 500. (2) [1911] 2 K. B. 738.

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Hugo Young, K.C., in reply. *Ball* v. *William Hunt & Sons* (1) does not touch the matter at all. The incapacity arising from the heart disease is immaterial so long as the incapacity arising from the accident continues.

Cur. adv. vult.

Feb. 13. COZENS-HARDY M.R. This appeal raises an extremely important and, so far as I am aware, novel point. Where a workman has sustained "personal injury by accident arising out of and in the course of" his employment, and this personal injury still exists, can an employer say that he is no longer liable to pay compensation under the Act because if there had been no accident the workman would now, by reason of some supervening infirmity not due to the accident, be equally incapacitated? It may be paralysis, or heart disease, or mere failure of powers by reason of old age. If this view is right, there is scarcely a case in which the workman may not have what have been hitherto understood to be his statutory rights challenged.

No distinction can be drawn for the present purpose between the Acts of 1897 and 1906. For fifteen years this contention has not been raised. To avoid misapprehension, I am not forgetting the obligation which rests upon the workman to establish his case. If the employer proves that the man has completely recovered from the effects of the accident, has been cured, an application for compensation must fail. The date of the application is the critical date. But where the man has not completely recovered, has not been cured, I think it is not necessary for him to establish that his present incapacity is due solely to the accident.

The argument on the part of the employer mainly rests upon the word "compensation." It is plain that "compensation" is not used in the common law sense. Except in the case of an infant, a man who is totally incapacitated by an accident can, under the statute, get only half his average weekly earnings for a period prior to the accident. In an action for negligence against the employer the man would recover a lump sum by way of

(1) [1912] A. C. 496.

damages based, according to a proper direction from the judge, upon the actual wages lost and the probabilities of the future, together with something by way of solatium for personal suffering. There is nothing of the kind to be found in the statute.

I have read Hamilton L.J.'s judgment, with which I entirely agree, and I do not think I can usefully add anything to what he has said on this point. There are, I think, indications in the statute which tend to confirm the view I have indicated. Rule 17 of Sched. I. provides for redemption of a weekly payment at the option of the employer. If the incapacity is permanent, the amount is the purchase-money of a Government life annuity subject to a discount of 25 per cent. The possibility of a supervening infirmity varying the rights is not hinted at.

The facts are extremely simple. Harwood was a miner. In October, 1909, he was injured by a fall of coal, two ribs were broken, and there was a permanent lesion of the right knee. Half wages were paid until February, 1910, when he was found light work at his old wages. In October, 1911, he met with a second accident, and further injured his right knee. Half wages were paid until May, 1912, when it was discovered that he was suffering from heart disease. There was no award or recorded agreement. In June, 1912, Harwood applied for compensation on the ground of total incapacity. The learned judge held that he was unable to work owing to the condition of his knee and also owing to the condition of his heart, and that it was not proved that the heart disease was connected with the accident. In the words of the learned judge: "If there had been no accident at all, he would still be incapable for work as a miner or banksman. I am of opinion that there is no work that the accident prevented him from doing that the heart disease has not also prevented him from doing, and that being so, on these facts my judgment must be against him." And he made his award accordingly.

For the reasons above stated I think the learned judge has misdirected himself. The appeal should be allowed with costs here and below, and the case must be remitted in order that the judge may award such weekly sum by way of statutory compensation as he may think fit.

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BUCKLEY L.J. The questions raised by this case may be stated thus: (1.) Does the Act give compensation for the injury; or, (2.), for the consequences of the injury as measured by diminished capacity to earn wages; and, (3.), if the latter, then do these consequences continue after a subsequent event has happened, such that if there had been no injury by accident there would nevertheless have been incapacity to earn wages? As to (1.), the answer is easy. If the workman suffers an injury which does not produce total or partial incapacity for work he is not entitled to compensation under the Act. Thus, if a workman in his employment sustains injury by accident resulting in the loss of two fingers of the left hand, but the evidence is that his capacity to earn wages is just as great as before, he is not entitled to compensation. The injury exists, but incapacity to earn wages does not. The compensation is for the latter, not for the former. He is to be compensated only for inability to earn wages in the future, and none the less because the amount is measured by what he has earned in the past. As to (2.), the dominant words of the Act are those in s. 1, which provide that in a certain event the employer shall be liable to pay compensation. There then follow the words "in accordance with the First Schedule to this Act." But resort cannot be had to the schedule for the purpose of cutting down the right to compensation. The intention of the schedule is to prescribe the scale of compensation and the mode and conditions of its enjoyment. (See *Ball* v. *William Hunt & Sons*. (1)) Looking on in the first section, I find from s. 1, sub-s. 2 (*a*) and (*c*), that the compensation is to be for disablement, and from (*a*) that disablement means disablement from earning wages. So far, therefore, I have this, that in an event the employer is to pay compensation for disablement to earn wages. Schedule I., paragraph 1 (*b*), then tells me what the scale is to be, and in describing the event relevant in the present case uses the words "where total or partial incapacity for work results from the injury." I learn from the House of Lords, again in *Ball* v. *William Hunt & Sons* (1), that incapacity for work means inability to earn wages or full wages as the case may be. After naming the

(1) [1912] A. C. 496.

event, Sched. I., paragraph 1 (*b*), goes on to provide that there is to be a weekly payment "during the incapacity," which must mean the incapacity for work resulting from the injury which has just been mentioned. From this paragraph, and again from paragraph 18, in which the words "the incapacity resulting from the injury" are found, I learn that the compensation is to be a compensation for disablement resulting in an inability to earn wages due to the injury. Looking at paragraph 16, I find that the weekly payment thus arrived at may be reviewed at the request of either party and may be ended, diminished, or increased. It follows that at any subsequent date either party may allege and prove that the incapacity to earn wages resulting from the injury has become greater or less or has ceased altogether. From these provisions it seems to me necessarily to follow that the compensation which the Act gives is not a compensation for the injury, but a compensation for the consequences resulting from the injury, such consequences disclosing themselves in the form of inability to earn wages due to the injury sustained.

Then as to (3.), this is the point at which arises the great difficulty of the present case. The word "compensation" conveys that inasmuch as the workman in search of wages is weighed down by the consequences of an injury which produces incapacity to earn wages, there shall be put in the other side of the scale such a sum as within the statutory limits shall redress the inequality of the balance. He will be compensated if by payment of money he be put in a position as good (within the statutory limits) as that in which he would have been for earning wages if he had not sustained the injury by accident. He is not to be put in a better position. Suppose then that the man who has lost his two fingers, having proved that he cannot earn the same wages as before, has been placed by agreement or by the order of the Court in receipt of a certain weekly payment and that then the employer comes to review and proves that the man has now, by something for which the employer is in no way responsible, totally lost his sight, or lost the whole of the left arm, so that whether the injury by accident to his fingers had happened or not, he would

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have been incapable of earning wages by reason of his total loss of eyesight or total loss of the arm. Or suppose (which is the present case) that the employer, having by agreement or under an arbitration paid compensation down to the date of the total loss of eyesight or loss of the arm, has thereupon discontinued the payment and that the man comes and seeks to establish that he is, by the accident which lost him his fingers, still incapacitated from earning wages notwithstanding the altered circumstances. How does the matter then stand? Upon those hypotheses the employer upon the application to review, or the man upon the application for an order for payment, has to deal with a state of facts in which it may be said that there is no incapacity for work resulting from the injury in his employment, for that (whether that injury had been sustained or not) there would have been incapacity for work by reason of something else; that there is no continuing consequence resulting from the accident, for if there had been no accident at all the man's incapacity would be the same. This course of reasoning leads to the conclusion that there is no continuing inability to earn wages attributable to the first accident. It is suggested that this is not so because the Act does not contain the word "solely" in the connection "personal injury by accident arising [solely] out of," &c., and is not to be read as if it were there contained. This is certainly true. For instance, if a man suffers an injury in his employment which diminishes his capacity to earn wages by 25 per cent., and subsequently suffers, not in his employment, an injury which diminishes his capacity to earn wages by a further 50 per cent., so that he can now earn only 25 per cent., he is no doubt entitled to be compensated on the footing of a 25 per cent. loss in his employment. But the consideration does not seem to me to give much assistance in answering the question when presented in the form that the second injury is such that the man would be totally incapacitated by that latter injury if he had not suffered the first injury at all. Suppose the first injury were the loss of two fingers of the left hand in the employment and the second were the loss of the left arm in a railway accident, is the man still suffering incapacity from the loss of the two fingers? Schedule I., par. 16, which provides for review, suggests an

argument for saying that the altered circumstances justify an order ending the payment. Schedule I., par. 17, which provides in certain circumstances for a life annuity, suggests an argument the other way. One test suggests itself which I may state as follows: Suppose the man before sustaining any injury was earning 28*s.* a week, and that he suffers (in his employment with employer A.) a first injury which reduces his earning capacity to 21*s.*, and suppose that he then suffers (in his employment with employer B.) an injury which produces total incapacity, and would still produce total incapacity even if the first injury had not been sustained. At the date of the first accident he was a 28*s.* man reduced by injury to 21*s.* At the date of the second accident he was a 21*s.* man reduced by injury to total incapacity. For the second injury he will be compensated on that latter footing. His compensation for the first injury, by which he was reduced from a 28*s.* man to a 21*s.* man, ought to continue also. In other words, his first employer cannot say that the man was so injured by the second accident that if there had been no first accident he would still be totally incapacitated and therefore he is no longer suffering inability to earn wages by reason of the first accident. The same result ought to ensue if the second injury were not in his employment. This view of the matter shews that although there is in a sense no continuing inability to earn wages due to the first accident after the second and greater injury, yet there is a continuing depreciation of the wage earner which produces its effect when he is affected by the second accident.

The facts here are that in October, 1909, and again in October, 1911, the workman sustained an injury to his knee. Down to May 20, 1912, the employers paid half wages. At that date the man had not recovered from the injury to the knee, but on that date heart disease supervened and had not been caused in any way by the accident. The learned county court judge has found that if there had been no accident at all he would by reason of the heart disease be incapable for work as a miner or banksman; that there is no work which the accident prevented him from doing which the heart disease does not also prevent him from doing. There was evidence to justify these findings of fact, and it is upon the footing of those findings that I have to deal with

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the matter. It seems to me that in that state of facts the arbitrator is, at the instance of the workman, investigating the question whether he is under a continuing incapacity to earn wages resulting from the injury. If he is, then (so the argument must run) if that incapacity were removed he would be capable of earning wages. But the fact is that if that incapacity were removed he would still be incapable of earning wages because of the incapacity arising from the heart disease. Therefore it is said he is not under incapacity to earn wages resulting from the injury and is not entitled to compensation under the Act. If this argument be correct the appeal must be dismissed. But if the sounder argument be, as I think it is, that the consequences of the first injury still continue, because it resulted in his standing at the date of the second injury in such a position that that second injury did him less pecuniary damage than it would otherwise have occasioned, then the appeal must succeed. This, I think, is right. In a sentence, my conclusion is that while the compensation is only for the continuing consequences of the injury measured by diminished capacity to earn wages, still a subsequent supervening cause leaves the consequence of that diminished capacity still existent and only adds a further diminished capacity. I think, therefore, that the appeal must be allowed.

HAMILTON L.J. This case raises a point of first impression and of small compass, but of great importance. Under the Workmen's Compensation Act the workman must prove, when his original proceedings come to a hearing, that he has sustained "personal injury by accident arising out of and in the course of his employment" and that "total or partial incapacity for work results from the injury." In this case the workman satisfied the learned county court judge as to both of these propositions. He proved that partial incapacity for work, namely his ordinary work as a miner, had resulted and then was still resulting from the injury, namely a permanent injury to his knee which restricted its movements and prevented him from doing his former work. If the case stopped here, he had shewn that he was entitled to be paid by his employer "compensation" by

way of weekly payments "during the incapacity." The employer, however, elicited and proved, as he was entitled to do, that by reason of infirmity supervening since and independently of the accident, namely a defective condition of the mitral and aortic valves of the heart, the workman was equally under incapacity for work, which incapacity resulted from this infirmity. In the learned judge's words, "He is incapacitated by both causes, each independent of the other, each operating if the other did not exist. He was rendered incapable of doing any but light work owing to the accident, and he is also incapable of doing any but light work in consequence of the heart disease. There is no work that the accident prevented him from doing that the heart disease has not also prevented him from doing." How stands the matter now? Whether the workman commences his proceedings at the earliest possible moment or at the latest, whether he delays to take proceedings from carelessness or ignorance or because the employer has made weekly payments and so rendered proceedings for the time being unnecessary, the workman is exposed to this risk of an independent supervening incapacity, and the difference is one only of degree. Equally when he comes to proof he has to bring himself within the Act rebus sic stantibus.

In my opinion the workman did bring himself within the Act, and he is not disentitled to be paid compensation by reason of the supervention of a disease of the heart. It cannot be said of him that partial incapacity for work has not resulted and is not still resulting from the injury. All that can be said is that such partial incapacity is not still resulting "solely" from the injury. To read the word "solely" into the Act after the word "injury" is not interpretation but is legislation, unless the context or the scheme of the Act (natural justice not being in question) demonstrates that the Legislature so intended.

The Act is a "compensation" Act, but it compensates the workman in a new and statutory manner in respect of a wholly statutory right. In assessing damages for injury caused to a plaintiff workman by the tortious negligence of the employer or his servants a jury would be directed that, their damages being

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a compensation once for all, they must consider not merely past injury, pain and suffering endured, expenses incurred and earnings lost, but also future loss. They would have to measure in money the future effects of permanent or continuing disablement, but they must consider also the possibility of future diminution or loss of earnings arising independently of the cause of action, from increasing age, from accident or illness in futuro, and so forth. They would be directed that they had to give solatium for suffering and compensation for disablement, but so that the tort-sufferer should not make a profit out of the wrong done him, the object being by the verdict to place him in as good a position as he was in before the wrong, but not in any wise in a better one.

The compensation for workmen under the Act is very different. In such a case as the present it measures compensation by reference to the past with a strict limit of 50 per cent. upon the relation of the future weekly payments to the average weekly earnings. It is based on what the workman has earned, not on what he will be prevented from earning. It gives nothing for expenses or suffering. Redemption of weekly payments by a lump sum is on the basis of an annuity, calculated by expectation of life and not by expectation of immunity from further accident or from growing age and infirmity, and it is reducible only by a discount of 25 per cent. in consideration of present payment and not by an estimate of the chance of such occurrences. The period of continuance of the weekly payment is during "the incapacity," that is, the incapacity resulting from the injury, and no reference is made to the possible supervention of other causes of incapacity. The object of the Act is to give an injured workman a livelihood so long as an injury incapacitates him from getting his living. That the employer provides the compensation, and not the Exchequer, is for this purpose immaterial. The Act is a guarantee of workmen against the risk of accident. It is not founded on indemnity, and the ideas of retribution for wrong-doing and of restoratio in integrum are foreign to it.

I am therefore of opinion that there is nothing in the scheme or language of the Act which invalidates the construction above

expressed, and I am fortified by the valuable opinion of Lord Pearson in *M'Callum* v. *Quinn*. (1) I think that the appeal should be allowed with costs.

Appeal allowed.

Solicitors: *Hughes & Masser, Coventry; Ullithorne, Currey & Co., for C. F. Elliot Smith, Mansfield.*

G. A. S.

[IN THE COURT OF APPEAL.]

HARROWING STEAMSHIP COMPANY *v.* THOMAS.

Charterparty—Lump Sum Freight—Loss of Ship and Part of Cargo by Excepted Peril—Delivery of Part of Cargo—Right of Shipowner to Freight.

Where a ship chartered for a voyage for a lump sum freight, to be paid on unloading and right delivery of the cargo, under a charterparty containing an exception of perils of the seas, is disabled from continuing the voyage, and part of the cargo is lost, through perils of the sea, the shipowners may earn the lump sum freight by forwarding the remainder of the cargo to the port of destination by a substituted ship or other means.

The plaintiffs chartered their ship to the defendants to load a cargo of timber, and carry it to "Port Talbot, a dock as ordered," for a specified lump sum as freight, to be paid on unloading and right delivery of the cargo. The charterparty contained the usual exception of perils of the seas. The ship arrived, with her cargo on board, off Port Talbot, when, owing to heavy weather, she was driven ashore and became a total loss. Part of the cargo was washed ashore, and was afterwards collected on the beach by the directions of the master, and deposited on the dock premises, the remainder being lost by perils of the sea.

In an action for the lump sum freight:—

Held, affirming the judgment of Pickford J. (2), that the shipowners, having delivered so much of the cargo as they were not excused by the excepted perils for not delivering, had performed their contract and earned the freight, notwithstanding that the ship had not completed her voyage, and that the portion of the cargo delivered had been so delivered otherwise than by the chartered ship.

APPEAL from the judgment of Pickford J. (2) in an action tried by him without a jury.

(1) 1909 S. C. 227; 46 S. L. R. 141. (2) [1912] 3 K. B. 321.

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The action was brought to recover a sum of 1347*l.* 9*s.*, as being a balance of lump sum freight due under a charterparty, after deducting an advance of 252*l.* 11*s.*

By a charterparty dated September 1, 1911, and made between Messrs. Robert Harrowing & Co. for the owners of the steamship *Ethelwalda* and William Thomas & Sons, charterers, it was agreed that the ship should load at a place in the Uleaborg district in Finland a full and complete cargo of pit props, and being so loaded should proceed to "Port Talbot, a dock as ordered, or as near thereto as she may safely get, and deliver the same always afloat on being paid freight as follows:—lump sum of 1600*l.* . . . . the freight to be paid in cash . . . . on unloading and right delivery of the cargo." The shipowners placed "at charterers' disposal the full reach of steamer on and under decks." The charterparty contained an exception clause, which included the usual exceptions, amongst them being one of the perils of the seas. The ship loaded her cargo and proceeded to Port Talbot, and anchored off the port on the evening of October 29, 1911. On the following morning, owing to heavy weather, she was driven ashore just outside the breakwater of the entrance channel to the dock, and eventually became a total loss. The deck cargo was swept off by the seas, and a good deal of it was washed ashore. The cargo in the hold was also gradually washed out, the process being assisted by holes cut in the ship's side for the purpose, and a substantial part of this cargo also found its way to the beach. The master gave notice of abandonment to the underwriters on ship. At the instance of one Captain Barge, the agent at Port Talbot of the Salvage Association, a firm of Jenkins & Co. began collecting the cargo so washed ashore. At Captain Barge's suggestion, Jenkins & Co. applied to the master of the *Ethelwalda*, asking him to enter into a contract for the collection of the timber so washed ashore and its delivery by carts on the dock premises. Eventually the master of the *Ethelwalda* did enter into such a contract on behalf of the plaintiffs with a stipulation that the cargo should be held by the dock company under a lien for the freight, and the work was carried out under that contract, and the plaintiffs paid Jenkins & Co. for the same. A portion of the cargo was never recovered, being lost by perils

of the seas. The dock company took possession of the cargo deposited on their premises, as it was brought to them, and claimed to hold it under a lien for freight for the shipowners, and also under a lien for their own charges. Messrs. Thomas & Sons, the charterers and consignees of the cargo, claimed to have it delivered to them free of any charge for freight. The dock company refused to give it up, and an action was brought against them by Messrs. Thomas & Sons in respect of it, with the result that an order was made by Scrutton J. that on payment by the plaintiffs in that action of the sum of 1347*l.* 9*s.* into a bank in the joint names of the respective parties' solicitors the dock company should release the cargo, which they accordingly did. The plaintiffs then brought their action for the freight. Pickford J. gave judgment for the plaintiffs. (1)

Maurice Hill, K.C., and *Leck, K.C.*, for the defendants. The first question in this case is whether, where there is a charter for a lump sum freight, and the ship is lost on the voyage and never arrives, but the cargo, or part of the cargo, is saved and forwarded by the shipowner by another ship or other means to the port of destination, and there delivered to the charterer, the shipowner can recover the lump sum freight. Then, secondly, if it is not an essential condition that the ship herself should arrive, the question arises whether, as the lump sum freight is one entire sum for one entire service, the shipowner can be entitled to it, unless the whole cargo is delivered. A further question is whether, in the circumstances of this case, even assuming that the shipowners might be entitled to perform their contract by transhipping the part of the cargo that was not lost, or sending it to the port of destination by other means, what was done in this case amounted to such a performance of the contract by the plaintiffs.

In *Robinson* v. *Knights* (2) "lump sum freight" was described by Keating J. as "an entire sum to be paid for the hire of the ship for one entire service," and by Brett J. as "a stipulated gross sum to be paid for the use of the whole ship for the whole voyage." In the judgment in *The Norway* (3) it is said,

(1) [1912] 3 K. B. 321. (2) (1873) L. R. 8 C. P. 465.
(3) (1865) Br. & L. 404; 3 Moo. P. C. (N.S.) 245.

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"Although the lump sum is called freight in the charterparty and bills of lading, we think it is not properly so called, but that it is more properly a sum in the nature of a rent to be paid for the use and hire of the ship on the agreed voyages." It follows that, in order to entitle the shipowner to the lump sum freight, it is essential that the chartered ship should arrive at the port of destination, and so complete the agreed voyage. Completion of the voyage must be by the chartered ship; a substituted ship, or other means of delivering the cargo at the port of destination, will not suffice, even if the whole cargo be thereby delivered; and a fortiori it will not suffice if only part of the cargo be thereby delivered. In this case the chartered ship never was an arrived ship; she never did complete the voyage by arriving at the dock at Port Talbot, which was her destination, having been wrecked outside that port. The shipowners, it is contended, had not under such a charterparty as this the right of earning the freight by forwarding the cargo to the port of destination by a substituted ship or other means. Any such right is negatived by the nature of a lump sum freight as defined in *Robinson* v. *Knights* (1) and *The Norway*. (2) Cases in which, under an ordinary charter, it has been held that the freight may be earned by forwarding the cargo in a substituted ship, such as *Shipton* v. *Thornton* (3), are no authority for the case of a lump freight charter. The suggestion that the carriage of the cargo by a substituted ship, if it be so carried at the expense of the shipowner, will entitle him to the lump sum freight cannot be supported in view of the jugdments in *The Norway* (2) and *Robinson* v. *Knights*. (1) By the terms of the charterparty the freight is to be payable on unloading and right delivery of the cargo by the shipowners at the port of destination. "Right delivery of the cargo" means "right delivery of the whole cargo" in the case of a lump sum freight, such freight being an entire sum to be paid for an entire service, which is not apportionable. Suppose that, though the ship arrived, she had no cargo on board, the whole of the cargo having been lost through an excepted peril, would the lump sum freight then be payable? No part of the cargo in this case was unloaded from the ship

(1) L. R. 8 C. P. 465. (N.S.) 245.
(2) Br. & L. 404; 3 Moo. P. C. (3) (1838) 9 Ad. & E. 314.

and rightly delivered by the shipowners. The shipowners gave notice of abandonment to their underwriters, and the ship became a total loss. Part of the cargo was washed out of her, and by the action of the sea was carried ashore and there collected as wreckage by order of the agent of the Salvage Association. What was done with regard to this part of the cargo cannot be regarded as an unloading and right delivery of cargo by the shipowners. [They also cited *Matthews* v. *Gibbs* (1); *The Bernina*. (2)]

George Wallace, *K.C.*, and *Dunlop*, for the plaintiffs. It is a fallacy to assume that all charters for a lump sum freight must be treated as standing on the same footing, and that in every case such a charter necessarily imports that, as a condition precedent to earning the freight, the ship must arrive with the cargo at the port of destination. The question in each case must depend on the terms of the particular charterparty. It may be that, as Pickford J. suggests, some lump freight charters may import such a condition, as for instance where part of the freight is to be paid on arrival of the ship, but it is contended that there is nothing in the terms of the charterparty in the present case to necessitate such a construction. The charterparty may be said in one sense to be a contract for the hire of the ship for the agreed voyage, but it is undoubtedly a contract for its hire for the purpose of carrying cargo; and there is nothing in the fact that the freight is fixed at a lump sum, instead of being determined by quantity of cargo delivered, to prevent the shipowner, in the event of the ship being disabled from continuing the voyage by perils of the sea, from earning the freight by transhipment of the cargo or forwarding it by some other means to the port of destination: see *Hunter* v. *Prinsep*. (3) It may be inferred from the judgment of Tindal C.J. in *Mitchell* v. *Darthez* (4) that in his opinion a shipowner is entitled thus to earn a lump sum freight. The right delivery of the cargo mentioned in the charterparty must mean delivery of such portion of the cargo as has not been lost by an excepted

(1) (1860) 3 E. & E. 282.
(2) (1886) 12 P. D. 36; 13 App. Cas. 1.
(3) (1808) 10 East, 378.
(4) (1836) 2 Bing. N. C. 555.

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peril. If part of the cargo had been lost on the voyage through an excepted peril, and the ship had arrived at the port of destination with, and the shipowners had delivered, the rest of the cargo, the shipowners would have been entitled to the lump sum freight: see *Merchant Shipping Co.* v. *Armitage* (1); *Williams & Co.* v. *Canton Insurance Office, Ld.* (2); *The Norway* (3); *Robinson* v. *Knights* (4); and, assuming, as is contended, that there was here a right delivery of the cargo saved by the shipowners, it equally follows that the freight has been earned.

The question whether the part of the cargo washed ashore was collected and carted to the dock premises by the contractor on behalf of the plaintiffs is really a question of fact on which Pickford J. found in favour of the plaintiffs. If the plaintiffs had caused this cargo to be collected in lighters and taken therein to the dock, it would clearly have been a right delivery of it under the charterparty, and there is no substantial distinction between that case and the present.

Maurice Hill, K.C., in reply.

Cur. adv. vult.

March 14. VAUGHAN WILLIAMS L.J. read the following judgment:—I doubt very much whether, at the date of the earlier decisions cited before us in this case, the judges before whom the question of the construction of lump freight charters came would have decided on the lines adopted by Pickford J. in this case, but I cannot but think that there has been for a long time a tendency not to apply the ordinary rules of construction in commercial cases, and in particular in shipping cases. The Courts have modified the natural construction to make decisions accord with commercial practice and convenience, which I have heard described as commercial equity.

I will go through the authorities cited to us, and see how far this construction in accordance with commercial convenience has regulated the decisions of the Courts in construing lump sum charters.

(1) (1873) L. R. 9 Q. B. 99.
(2) [1901] A. C. 462.
(3) Br. & L. 404; 3 Moo. P. C. (N.S.) 245.
(4) L. R. 8 C. P. 465.

I accept for the purpose of this judgment the facts found by Pickford J., namely, that a large part of the cargo, having been thrown up on the shore by perils of the sea, was collected by persons whose services were accepted and paid for by the master of the ship *Ethelwalda* after the master had given the underwriters notice of abandonment; and that these pit props, for that was the nature of the cargo, were carried into a dock at Port Talbot, and there delivered to the defendants, the charterers, under an order of Scrutton J. upon a certain sum being paid into joint names in a bank.

This action was brought by the plaintiffs to recover the lump sum freight, and Pickford J. has held that the plaintiffs, having delivered to the defendants so much of the cargo as was not lost by the excepted perils of the sea, are entitled to the payment of the whole lump sum freight.

I will now deal with the authorities. First there is the case of *Hunter* v. *Prinsep*. (1) This case does not seem to have been cited before Pickford J., but was cited and relied on by the plaintiffs before this Court, and in particular a passage in the judgment of Lord Ellenborough on p. 394 of the report was relied on. It is this: "If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon this subject. If the shipowner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight, or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for

(1) 10 East, 378.

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selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight. The postea must therefore be delivered to the plaintiff." This case has no direct application to lump sum freight. It was a case of freight payable per ton. The most that can be said of this decision is that it established, or, rather, affirmed, the right of the shipowner whose ship has been disabled in the course of the voyage to earn freight in respect of goods saved because the merchant receives advantage from the voyage. The same proposition had been sanctioned in the cases cited by Richardson, counsel for the defendants. I have looked at those cases. The case in its facts had no reference to lump sum freight. It only affirms that, in a case where freight is payable pro rata itineris, the merchant in fairness must pay freight for goods saved and accepted by him, because he receives advantage from the voyage. It does seem to recognize an inference outside the actual words of the contract. I wish to say that the freight there spoken of is, I think, a reasonable freight payable by the owner of the goods on the acceptance by him of the goods.

Next I will deal with the case of *Mitchell* v. *Darthez*. (1) This was a case in which there was a charter under a lump freight contract. Lawrence J. is cited on p. 565 as having said in *Cook* v. *Jennings* (2): "He," meaning the master, "is not entitled to the whole freight unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled pro rata unless under a new agreement." After this observation of Lawrence J. there was then cited by Serjeant Spankie, counsel for the defendants, at p. 565, the following passage from Abbott on Shipping—I have not got the number of the edition, but it was from an edition prior to 1836, chapter 7, which runs thus: "The contract for the conveyance of merchandise is in its nature an entire contract; and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and

(1) 2 Bing. N. C. 555. (2) (1797) 7 T. R. 381.

labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week"—"In the case of a general ship or of a ship chartered for freight to be paid according to the quantity of the goods, there can be doubt that freight is due for so much as shall be delivered, the contract in these cases being distinct, or, at least, divisible, in its own nature. But suppose a ship chartered at a specific sum for the voyage without relation to the quantity of the goods (in which case the contract, as observed by Lord Chancellor Hardwicke (see *Paul* v. *Birch* (1)), is more properly a contract for the use of the ship than for the conveyance of the merchandise) should lose part of her cargo by a peril of the sea but convey the residue to the place of destination. In this case I do not find any authority for apportioning the freight, and it seems to have been the opinion of *Malyne* that nothing would be due; and the case of *Bright* v. *Cowper* (2), which will be mentioned hereafter, may be considered as an authority in support of that opinion. But probably if the question should arise again the determination of it would depend upon the particular words of the charterparty: without a very precise agreement for that purpose it seems hard that the owners"—that is, the shipowners—"should lose the whole benefit of the voyage where the object of it has been in part performed, and no blame is imputable to them." The decision in this case was, first, that in the circumstances of that case the goods could not properly be said to have been carried to their destination; secondly, that there was no new and implied contract founded on meritorious service rendered to the charterers by the shipowner, in the partial performance of the voyage contemplated and the acceptance of the goods from Fayal to Gibraltar, the carriage not having been the act of the plaintiff, the shipowner, because the goods were forwarded by the Vice-Consul acting as the agent of the freighters, although the Vice-Consul was desired by the master to forward them, and the agents of the freighters accepted the goods and paid the freight, and thereby recognized the act of the Vice-Consul as their agent. At p. 571 Tindal C.J. winds up his judgment by saying: "The claim of the shipowner must, therefore,

(1) (1743) 2 Atk. 621. (2) (1612) 1 Brownlow, 21.

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rest upon an implied contract to remunerate him for service performed, not according to the agreement, but a service from which the freighters have received a benefit." I cannot infer from anything in the judgment of Tindal C.J. that he would have held the full lump sum freight to have been payable had the goods been forwarded to their destination by the master of the ship on behalf of the shipowner. The only passage which I can find in the judgment favouring the claim of the shipowner to recover the lump sum freight is on p. 568, where Tindal C.J. says: "But the plaintiff never performed that homeward voyage either in the ship mentioned in the charterparty or any other."

The next case I will refer to is *The Norway*. (1) There are two reports, one in the Court below and one in the Privy Council. That case was a case in which the contract was for a lump sum freight, and it was held that there is no deduction from the lump freight of proportional freight for part cargo not delivered, and that, even if the loss had been by the negligence of the ship-owner, the shipper's remedy would only be a cross-action, and it was stated that "the lump sum called freight was not properly so called, but was more properly a sum in the nature of a rent to be paid for the use and hire of the ship."

I do not think any of the subsequent cases have in any way displaced or modified either of these propositions.

Next I will deal with *Robinson* v. *Knights* (2), in which Keating J. describes lump freight as an entire sum to be paid for the hire of the ship for one entire service. In neither of these cases was the necessity in the performance of the contract for the arrival of the ship discussed, but it seems to have been assumed. Brett J. says: "The terms of the charter are not precisely the same in this case as in the case of *The Norway* (3), but I think that the freight in both cases is a stipulated gross sum to be paid for the use of the whole ship for the whole voyage." Transhipment does not seem consistent with this view. Use of the whole ship for the whole voyage prima facie is an essential part of the

(1) Br. & L. 226, 404. (2) L. R. 8 C. P. 465.
(3) Br. & L. 404.

consideration, and not the less so because the payment of the lump sum freight is only to be made on the delivery of the cargo, except such as is lost by excepted perils of the sea. I cannot see anything in either *Merchant Shipping Co.* v. *Armitage* (1), or in *Williams & Co.* v. *Canton Insurance Office, Ld.* (2), which in terms militates against the view that the arrival of the ship hired at a lump freight is essential to earning that lump freight. Indeed, the case of *Williams & Co.* v. *Canton Insurance Office, Ld.* (2) is wholly irrelevant to the case that we have to decide. What is relied on is the dictum of Lord Lindley at p. 473: "A lump sum freight is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery, having regard to and excluding the excepted perils." I wish to say in regard to that dictum of Lord Lindley that it is an instance of that which I mentioned; there is a tendency at the present day towards really modifying the actual words of the contract in order to do what is fair and just as between the shipowner and the charterer. Then the quotation goes on: "In other words, the cargo, in this clause of the charterparty, does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that affords no defence to a claim for the lump sum freight, although such non-delivery if wrongful will give rise to a cross-action. This was settled by the Court of Exchequer Chamber in *Merchant Shipping Co.* v. *Armitage* (1), which followed a decision to the same effect by the Privy Council in *The Norway*." (3)

But at the same time I agree, though, like Pickford J., not without doubt, with the judgments of my brethren which they are about to read, because, as I have already stated, having regard to the present universal practice of insurance, it seems to me that to hold that the arrival of the chartered ship is not a condition precedent to earning the lump sum freight does more complete justice between the shipowner and the charterer, and

(1) L. R. 9 Q. B. 99.
(2) [1901] A. C. 462.
(3) Br. & L. 404; 3 Moo. P. C. (N.S.) 245.

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for that reason I concur in the judgment of my brethren. The great difficulty in this case has been that the ship of which the charterers were to have the whole use for the whole voyage has never performed the whole voyage. The claim is not for reasonable remuneration for delivery and acceptance of the goods, but for the whole lump sum freight. The appeal must be dismissed.

FARWELL L.J. read the following judgment:—The cases have established a rule of construction with regard to lump sum freight charterparties, which is thus stated by Lord Lindley in the House of Lords in *Williams* v. *Canton Insurance Office, Ld.* (1): "A lump sum freight is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and, although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery having regard to and excluding the excepted perils." The object of the rule is to avoid the injustice that might be done by the doctrine of *Cutter* v. *Powell* (2) in many cases, if the shipowner were thereby deprived of his freight, and the charterer got his goods without any payment, although the ship arrived at her port of destination but with the loss of some of the cargo shipped owing to excepted perils, and which would in accordance with the ordinary practice be covered by insurance. The rule, like all other rules of construction, yields, of course, to clear evidence of contrary intention, but, being founded on honesty and fair dealing, ought not to be made dependent on small variations of phraseology. Lord Lindley goes on to add to the sentence quoted above: "In other words, the cargo in this clause of the charterparty does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that affords no defence to a claim for the lump sum freight, although such non-delivery if wrongful will give rise to a cross-action." The question of wrongful non-delivery of all or part, either of the cargo undertaken to be delivered, or of the cargo shipped, does not arise in this case, and I express no opinion on it. There are several dicta on the point

(1) [1901] A. C. 462, at p. 473. (2) (1795) 6 T. R. 320.

in *The Norway* (1), and in Lord Bramwell's judgment in *Merchant Shipping Co.* v. *Armitage*. (2)

Now, the rule being as stated, it is said that the first essential is that there must be an arrived ship, and that such ship must be the actual ship chartered. I agree that some ship must have arrived to such an extent as either mediately or immediately to discharge the cargo that the shipowner undertook to deliver. The gist of the contract is that the shipowner should convey and deliver to the charterer or his consignee the goods included in the charter. But it was laid down by Lord Ellenborough in *Hunter* v. *Prinsep* (3) that "if the ship is disabled from completing her voyage, the shipowner may still entitle himself to the whole freight by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded; unless the forwarding them be dispensed with, or unless there be some new bargain upon the subject." It is said that this ruling did not apply to a lump sum freight, but no case in the books, nor any text-writer, has been cited to us to shew that it is not of general application, and it appears to me to be founded on good sense and to be as applicable to lump sum freights as to others. The contrary proposition is hardly consistent with *Mitchell* v. *Darthez* (4), for the Court would not have spent time in determining that the shipowner could not earn his freight by transhipping, unless he chartered the substituted vessel at his own expense, if he could not earn it at all under any terms of transhipment, nor would Tindal C.J. have said in the beginning of his judgment, "But the plaintiff never performed that homeward voyage, either in the ship mentioned in the charterparty or in any other," if the only way of performing the contract was by employing the ship mentioned in the charterparty. He must not impose any greater risk by enlarging the excepted perils in the substituted ship (*The Bernina* (5)), but as a general proposition he can tranship and so earn his freight by delivering the cargo undertaken to be delivered. Then it is said that there was nothing like transhipment here, but that

(1) Br. & L. 408, 409.
(2) L. R. 9 Q. B. 99, at pp. 110 and 111.
(3) 10 East, 378, at p. 394.
(4) 2 Bing. N. C. 555.
(5) 12 P. D. 36; 13 App. Cas. 1.

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the timber was delivered to the waves and by them cast upon the beach; and this is true, but it was to the extent of about two-thirds of the entire cargo collected and taken in carts to and delivered at the place of destination. Lord Ellenborough does not specify transhipment, but says "by forwarding the goods by some other means." If the vessel had run upon a rock outside the harbour and become fixed there, I cannot doubt that, if the sea and wind abated and the shipowner either carried the timber in lighters, or towed it into the harbour, and then transported it by land to its place of destination, this would have been good delivery; the mode of delivery is only a means to an end; the substance is the delivery in fact of the cargo undertaken to be delivered.

Whether the shipowner was the person who delivered or not is a question of fact on which I agree with the finding of Pickford J. Captain Barge's duty was to act promptly on behalf of whomsoever it might concern; he was acting, not for himself, but on behalf either of the shipowner or of the Salvage Association, whichever might elect to adopt his acts, and the shipowner did so.

I am of opinion that this appeal fails.

KENNEDY L.J. read the following judgment:—In this case the plaintiffs chartered their steamship *Ethelwalda* to the defendants to load a cargo of pit props at a place in the Uleaborg district of Finland, and carry it to a dock at Port Talbot for a specified lump sum as freight. The freight was payable under article 9 on unloading and right delivery of cargo. The charterparty contained the usual exception of perils of the seas. The *Ethelwalda* arrived with her cargo, which consisted in part of a deck-load, outside the port of discharge, when owing to heavy weather she was driven against the breakwater and became a total loss. About two-thirds of the cargo was washed ashore and was collected on the beach by the directions of the master of the *Ethelwalda*, acting on behalf of the plaintiffs, and placed on the dock premises and there delivered to the defendants, the residue of the cargo being lost by perils of the seas. The plaintiffs brought the present action to recover the lump sum freight.

Pickford J. has held that the plaintiffs, having delivered to the defendants so much of the cargo as they were not prevented by the excepted perils from delivering, had performed their contract, and were entitled to require payment of the lump sum freight. It is against this judgment that the present appeal has been brought.

The material facts, as I have summarized them, are not really in dispute. It is true that Jenkins, the contractor who collected the timber as it came ashore, and carted it to the dock premises, where the defendants claimed and got delivery, commenced his work at the instance of Captain Barge, the agent of the Salvage Association at Port Talbot, acting, I infer,—as the plaintiffs had given notice of their abandonment of the *Ethelwalda* to their underwriters—for whomsoever it might concern. But, at Captain Barge's suggestion, Jenkins then applied to the master of the *Ethelwalda*, and asked him to enter into a contract for the collection of the timber and its delivery by means of cartage on the dock premises, and the master of the *Ethelwalda* on behalf of the plaintiffs did enter into the contract with a stipulation that the cargo was to be held under a lien for freight; and the work was carried out under that contract, and the plaintiffs have paid the contractor for these services. In the Court below, and before us, the learned counsel for the defendants argued, or rather, I think I should say, suggested, that there was some intervention by the underwriters which affected the plaintiffs' claim, but, like the learned judge in the Court below, I must confess myself unable to see any substance in such a contention. Whatever the effect of their action may be in law, in regard to the present claim, I hold it to be clear, as a matter of fact, that it was the plaintiffs who by their agent collected the cargo and delivered it to the defendants.

Whilst, however, there is not, I think, any substantial dispute as to facts, two questions of law, each of which is of considerable general importance, have been raised by the appellants both in this Court and before my brother Pickford. They contend, in the first place, that, as the stipulated freight was a lump freight, it could be earned by the plaintiffs only if the cargo was carried to its destination in the *Ethelwalda*, and therefore, inasmuch as

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she was wrecked outside the breakwater, and the cargo, as it came ashore, was conveyed to the dock in the way in which I have described, no freight could become due, even if the whole cargo had been thus delivered to the defendants. Secondly, they contend that, if they are wrong in this, yet, inasmuch as part of the cargo loaded on board of the *Ethelwalda* was lost and not delivered, that circumstance bars the maintenance of the plaintiffs' claim.

I proceed to consider each of these contentions.

It is certainly to me a novel view that in the case of every lump sum freight charterparty the shipowner, in order to earn that freight, must perform the whole voyage in the particular ship named in the charterparty, and that its performance in part by means of a substituted ship or other instrument of delivery, if the chartered ship becomes disabled in the course of the voyage, is not permissible, even though the whole cargo is in fact carried to its appointed destination. I asked the appellants' counsel if they could cite in support of the proposition a decided case or a text-book of recognized authority on shipping law, and none was, or, as I believe, could be, adduced. I am unable to see any sound reason for grafting, merely because the stipulated freight is, as is common enough in the case of homogeneous cargoes such as timber, a lump freight, and not one calculated by weight or measurement, so serious a qualification as the appellants' contention would involve upon the general law as it was laid down long ago by Lord Ellenborough in *Hunter* v. *Prinsep*. (1) He said: "The shipowners undertake that they will carry the goods to the place of destination, unless prevented by dangers of the seas or other unavoidable casualties; and the freighter undertakes that, if the goods be delivered at the place of their destination, he will pay the stipulated freight; but it is only in that event, namely, of their delivery at the place of destination, that he, the freighter, engages to pay anything. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination." The appellants contend that the law laid down by Lord Ellenborough in this

(1) 10 East, 378, 394.

quotation from a passage which has, I think, ever since been treated as the locus classicus in reference to the relative rights and duties of the parties to a contract of affreightment has, if the freight be a lump freight, no application. They ask the Court to hold that a shipowner whose laden ship is by perils excepted in the charterparty disabled in the course of the voyage from carrying her cargo to its destination is not entitled to earn the lump sum chartered freight by transhipment or any other means. They are prepared to argue—logically, indeed, they must be—that he is under the like disability if, when his ship is by the like perils stranded outside the place of destination, he employs lighters to carry the cargo to that place. I venture to think that one ought to hesitate long before adopting as a part of the law of affreightment a rule which would be as little consistent with justice as it would be conducive to the interest of commerce. I say "as little conducive to the interest of commerce," because if you deprive the shipowner of the right to earn his freight by procuring means to forward the cargo, which the chartered ship has been disabled by excepted perils from carrying to its destination, it may easily happen that the cargo owner will for an indefinitely long time be unable to get his property landed from the disabled ship at some distant or little frequented port. I say "as little consistent with justice" because, where the disaster which disables the carrying ship, as it well may do, occurs close to the place of destination, the shipowner, who has performed, say, nine-tenths of the essential service, will, unless he can make some new agreement with the cargo owner, get no recompense, although by lighters or other means of conveyance he is able and willing immediately to put the cargo owner in possession of his property at the place of contracted destination.

It is admitted, as I have said, that the appellants can produce no decision for their contention on this point. But, in truth, the reasoning of Tindal C.J. in *Mitchell* v. *Darthez* (1) is, I think, manifestly opposed to it. That was a case in which the plaintiff's vessel was chartered for a voyage under a lump freight contract. She was disabled at an intermediate port. Part of the cargo was sent on in another ship and arrived at its destination.

(1) 2 Bing. N. C. 555.

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The shipowner sued for his lump sum freight. Tindal C.J., who delivered the judgment of the Court of Common Pleas, held that he was not entitled to succeed, expressly because it appeared that this cargo had been so forwarded not by the shipowner or his agents but on behalf of and at the expense of the cargo owners. It is, I think, a clear inference from his judgment that he considered that, had the cargo been forwarded to its destination by the master of the vessel on behalf of the plaintiff, the shipowner, the charter freight would have been payable, and I would refer in regard to this to Judge Carver's reference to this case in his work on the Carriage of Goods by Sea, especially at paragraphs 551 and 559 (5th ed., pp. 712, 718).

The only sort of authority which the defendants' counsel put forward for their contention consisted of inferences which they invited us to draw from expressions to be found in the judgments in two reported cases, in each of which the freight reserved by the charterparty under consideration was a lump sum. In the judgment of the Privy Council in *The Norway* (1) it was said that the lump sum called freight was not properly so called, but was more properly a sum in the nature of a rent to be paid for the use and hire of the ship. In *Robinson* v. *Knights* (2) Keating J. described the freight payable under the charterparty in that case as an entire sum to be paid for the hire of the ship for one entire service, and Brett J., as he then was, in regard to it used the expression "a stipulated gross sum to be paid for the use of the whole ship for the whole voyage." It appears to me that none of these statements really afford support to the contention of the present appellants. They must, of course, be read in each case in reference to the particular charterparty which was under the consideration of the Court and in reference to the particular question which had to be decided in respect of that charterparty. Neither in *The Norway* (1), nor in the case in the Common Pleas, was there any question as to the arrival of the chartered vessel at the port of destination. In each case the vessel had in fact arrived, and therefore the Courts had not to consider any question of the shipowner's right, in Lord Ellenborough's words, to earn the whole freight by forwarding the goods by some other

(1) Br. & L. 404; 3 Moo. P. C. (N.S.) 245. (2) L. R. 8 C. P. 465.

means to the place of destination. What they had to decide was the distinct and different question whether under the particular terms of the charterparty before them the shipowner was entitled to claim payment, without deduction, of the whole freight where only part of the cargo was delivered out of the arrived ship—a question involved in the second contention of the defendants which I shall consider presently. Further, it is to be noted that in each of these cases the terms of the charterparty, as I understand the report, were in a material respect different from those of the charterparty with which we are concerned in the present case. In both of them the lump freight was, as to some portion, expressly made payable at a time to be ascertained by reference to the ship's arrival at her destination. In *The Norway*, as is pointed out in the judgment on p. 409 of Browning and Lushington's report, one-third in cash was made payable "on arrival at the port of delivery." In *Robinson* v. *Knights* (1) the provision was that freight should be paid in cash half on arrival and the remainder on unloading and right delivery of the cargo. I must not be understood to say that even such stipulations in a charterparty ought, if that question should ever arise for decision, to be held to affect the shipowner's right, in case of his ship's disablement in the course of the chartered voyage, to forward the cargo and earn the lump sum freight. But the presence of those stipulations in the particular charterparty in each case under consideration cannot properly be left out of sight when we have to consider the expressions in the judgments to which I have referred, and it differentiates the charterparties which contained such stipulations from the charterparty in the present case, which, except that the freight is to be a lump sum and not calculated per standard or per fathom of the timber shipped, in no way differs from the ordinary charterparty for the services of a ship to carry a particular cargo to a particular port, and which expressly provides for the payment of the lump freight, not in reference to the arrival of the ship, but, according to article 9, "on unloading and right delivery of cargo." I agree with Pickford J. when he says: "I do not say that there may not be lump sum charters in

(1) L. R. 8 C. P. 465.

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which the freight, being payable for the use of the particular ship, is not to be paid unless the ship completes her voyage. There may be such charters, but I do not think that this is the effect of the present one." I may add in this connection that it may be worth noting that by the terms of this charterparty in this case the charterers' agents were to load a full and complete cargo.

I now come to that which I have called the second contention of the defendants, which is that only a part of the cargo was delivered, and, therefore, the contract not having been completely performed by the plaintiffs, they are, according to the principle exemplified by the leading case of *Cutter* v. *Powell* (1), not entitled to claim the lump sum which constituted the agreed remuneration for the performance of the contract of affreightment. Upon this point also I am of opinion that the judgment of Pickford J. in favour of the plaintiffs was right. What, under the contract contained in the charterparty, was the condition precedent to the plaintiffs' right to the payment of the lump freight? It was, as I construe the document, the right delivery of the cargo. What is, under this charterparty, meant by "the cargo"? To ascertain this, we must look at the charterparty, and, so looking, we find that what the shipowner has to deliver is not in all circumstances the quantity of cargo shipped, but all which was shipped and of which delivery was not prevented by any of the excepted perils. This is the law as enunciated in the judgments both of Lord Coleridge C.J. and Bramwell B. in the case of *Merchant Shipping Co.* v. *Armitage* (2), in which the charterparty under the consideration of the Exchequer Chamber was in its terms, as to payment of a lump sum freight, excepted perils, and right delivery of cargo, like the charterparty in the present case, and in which, as in the present case, part of the cargo had been lost by excepted perils, and therefore the cargo owner had got only a partial delivery. Lord Coleridge C.J. at p. 107 dealt with the point in these terms: "If it were a matter entirely free from authority there might be some ground for saying that 'entire discharge and right delivery of the cargo'

(1) 6 T. R. 320. (2) L. R. 9 Q. B. 99.

meant the entire discharge and right delivery of the cargo originally put on board. But the fair and reasonable construction of it, regard being had to the contract being for a lump sum, seems to me to be that which the Courts have already put upon similar contracts—that the cargo is entirely discharged and rightly delivered, if the whole of it not covered by any of the exceptions in the contract itself is delivered. Now in this case that which was not delivered and which was not discharged was not so delivered and was not so discharged by reason of perils within the exceptions of the very contract itself; and, therefore, according to these authorities, and according to the reason of the thing, it appears to me that the contract was complied with, and that the lump sum was earned, and that what has not been paid of the lump sum ought to be paid." Bramwell B., at p. 110, expresses the same opinion: "What is the meaning of 'the cargo'? In my opinion it is the cargo which she has to deliver. It does not mean the cargo she has shipped, but which she is not bound to deliver, which the shipowner is excused from delivering; it means the right delivery of the cargo which is to be delivered, not the right delivery of the cargo which was originally shipped on board of her."

In a comparatively recent case in the House of Lords the law has been laid down in the same way by Lord Lindley. The case was *Williams & Co.* v. *Canton Insurance Office, Ld.* (1) "A lump sum freight," said his Lordship, "is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery, having regard to and excluding excepted perils. In other words, the cargo in this clause of the charterparty does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that"—namely, the cargo shipped—"affords no defence to a claim for the lump sum freight, although such non-delivery, if wrongful, will give rise to a cross-action. This was settled by the Court of Exchequer Chamber in *Merchant Shipping Co.* v.

(1) [1901] A. C. 462, at p. 473.

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Armitage (1), which followed a decision to the same effect by the Privy Council in *The Norway*." (2)

These authoritative pronouncements of the law—to which may be added the inference of the opinion of Tindal C.J. from the reasoning of his judgment in *Mitchell* v. *Darthez* (3), to which I have already referred, in the case of the transhipment and delivery of part of a cargo—constitute, in my judgment, a sufficient answer to the defendants' second contention. It is common ground that the goods not delivered in the present case were not delivered because they had been lost by excepted perils. The defendants' counsel asked in the course of the argument what, as to the right to freight, ought to be the legal consequence of the chartered ship arriving without any of the cargo on board, so that nothing was delivered, and they further asked whether, if the loss had been caused not by excepted perils, but by the wrongful act or negligence of the shipowner, the lump freight would nevertheless be payable. It is, I think, sufficient to say that it is quite unnecessary for the purpose of our judgment in the present case to decide either of these points which are not involved. But it is clear from his judgment in *Merchant Shipping Co.* v. *Armitage* (4) that Bramwell B., for the reason that the delivery of cargo is a condition precedent to payment, would have answered the first of the appellants' questions in favour of the owner of cargo, as he there states; and that in regard to the second question he would have concurred in the opinion expressed by Lord Lindley in the concluding sentence of the passage in his judgment in *Williams & Co.* v. *Canton Insurance Office, Ld.* (5), which I have already quoted, that, even if the non-delivery of part of the cargo is due to wrongful conduct or negligence on the part of the shipowner, the proper remedy of the cargo owner is by cross-action. It is, however, in my judgment, as I have already intimated, useless, for the purpose of deciding the present case, to consider how these questions ought to be decided, the relevancy of which is excluded by the facts of the case under consideration.

(1) L. R. 9 Q. B. 99.
(2) Br. & L. 404; 3 Moo. P. C. (N.S.) 245.
(3) 2 Bing. N. C. 555.
(4) L. R. 9 Q. B. 99, at p. 111.
(5) [1901] A. C. 462.

In my opinion, the judgment of Pickford J. was right, and this appeal should be dismissed.

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Appeal dismissed.

Solicitors for plaintiffs: *Holman, Birdwood & Co.*
Solicitors for defendants: *Trinder, Capron & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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BARHAM *v.* LORD HUNTINGFIELD.

Practice—Discovery—Interrogatories—Defamation — Publication to Unknown Persons.

In an action for slander, imputing immoral conduct to the plaintiff, a married woman, the statement of claim alleged publication to one named person, and publication also during three specified years to various other persons unnamed. The plaintiff sought to administer to the defendant interrogatories asking whether the defendant had in any of the three years uttered the words complained of or words to the same effect to any persons, other than the person named, and the names of the other persons, if any:—

Held, that the interrogatories were inadmissible.

Russell v. *Stubbs, Ld.* (1908) 52 Sol. J. 580, and post, p. 200, discussed and distinguished.

APPEAL against an order made by Bucknill J. at chambers disallowing certain interrogatories.

The action was for slander. The plaintiff, a married woman, lived with her husband at Low Farm in Suffolk. The plaintiff's husband was head horseman in the employment of one John William Le Grys, who was the defendant's tenant of Low Farm and of another farm called Gothic Farm. Paragraphs 4 and 5 of the statement of claim were as follows: "4. On a day the date of which the plaintiff cannot precisely specify, save that it was at the end of the year 1910 or early in the year 1911, the defendant falsely and maliciously spoke and published of the plaintiff to John William Le Grys the following words: Those Barhams (meaning the plaintiff and her husband) have kept their place as an improper house and you (meaning John William Le Grys) have had connection with Mrs. Barham

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(meaning the plaintiff). 5. The plaintiff believes and alleges that the defendant during the years 1910, 1911, and 1912, falsely and maliciously spoke and published to various other persons the statement that the plaintiff and her husband had kept their place as an improper house and that the plaintiff had had connection with John William Le Grys. The plaintiff cannot give particulars until discovery."

The defendant by his defence denied that he spoke or published the words complained of, and pleaded justification and privilege. In support of the plea of privilege the defendant gave particulars in which it was alleged that the constant visits of Le Grys to the plaintiff created a scandal in the neighbourhood and the defendant received complaints of the conduct of Le Grys and the plaintiff from the son and daughter of Le Grys, and in the circumstances it was the duty of the defendant to speak to Le Grys, which the defendant did, using the words complained of without malice and in the belief that what he said was true.

The plaintiff obtained leave from the Lowestoft District Registrar to administer to the defendant the following interrogatories:—

1. Did you in 1910 or 1911, and, if so, when, utter to John William Le Grys the words set forth in paragraph 4 of the statement of claim herein or words substantially to the same effect?

2. Did you in 1910, 1911, or 1912 utter the said words or words substantially to the same effect to any person or persons other than John William Le Grys?

3. If the answer to the last preceding interrogatory be Yes, specify the person to whom you uttered the said words and the times at which you uttered them, identifying each occasion.

4. If the answers to the first and second interrogatories or either of them be Yes, when before the said words, or at all, did you give to the plaintiff or to John William Le Grys, or either and if so which of them, any opportunity to be confronted by the son or daughter of John William Le Grys or any other person for the purpose of enabling the plaintiff to contradict or otherwise deal with the complaints alleged in paragraph 3 of the defence herein to have been made by the said son and daughter to you?

5. Did the plaintiff at any time and if so when verbally deny to you that she had had connection with John William Le Grys?

6. Did you ever invite or afford opportunity to John William Le Grys, and if so, when, verbally or otherwise, to deny to you that the plaintiff had been guilty of misconduct with him? Did John William Le Grys ever verbally or otherwise deny the said matter?

7. If the answers to the fifth and sixth interrogatories or either of them be Yes, what steps, if any, did you subsequently take to contradict the statement that John William Le Grys and the plaintiff had had connection with one another?

8. If the answers to the fifth and sixth interrogatories or either of them be Yes, did you after receiving from the plaintiff or John William Le Grys or either of them a denial that either had been guilty of having connection with the other give notice verbally, or otherwise, or cause such notice to be given, to the plaintiff or her husband to quit the cottage occupied by them?

9. When, if at all, during 1910, 1911, or 1912 prior to the delivery of the defence herein have you ever alleged to the plaintiff or to any person all or any one and if so which of the matters alleged in the particulars given under paragraph 2 of the defence herein? (This referred to particulars of the defence of justification.)

10. When, if at all, prior to the delivery of the defence herein have you given to the plaintiff any and if so what opportunity to contradict or otherwise deal with any of the allegations set forth in the particulars given under paragraph 2 of the defence herein?

11. Have you ever given to the plaintiff any opportunity to be confronted with any of the persons mentioned in the particulars given under paragraph 2 of the defence herein?

The defendant appealed to Bucknill J. at chambers against the allowance of any of these interrogatories except the first. Bucknill J. disallowed all the remaining interrogatories.

The plaintiff appealed.

Walter Stewart, for the plaintiff. It was decided by the House of Lords in *Russell* v. *Stubbs, Ld.* (1) that it is permissible in an

(1) 52 Sol. J. 580, and post, p. 200.

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action for defamation to allege publication to persons unknown, and to interrogate the defendant as to the names of persons to whom publication has been made: see also Odgers on Libel and Slander, 5th ed., pp. 626, 627. There has been no application to strike out paragraph 5 of the statement of claim, and the second and third interrogatories should on the authority of *Russell* v. *Stubbs, Ld.* (1) have been allowed. Similar interrogatories were allowed in an unreported case of *Frere* v. *Frere*. The fact that an interrogatory is a fishing interrogatory, or in the nature of cross-examination, does not necessarily render it bad. The remaining interrogatories are directed to the plea of privilege, and on the authority of *Elliott* v. *Garrett* (2) and *White & Co.* v. *Credit Reform Association and Credit Index, Ld.* (3) should be allowed.

[KENNEDY L.J. referred to *Maass* v. *Gas Light and Coke Co.* (4)]

McCardie, for the defendant, was only called upon as to the second and third interrogatories. The report of *Russell* v. *Stubbs, Ld.* (1) in the *Solicitors' Journal* is incomplete and misleading, as it does not state that the decision of the Court of Appeal, which was affirmed by the House of Lords, turned entirely on the special circumstances of that case, for it was shewn by an uncontradicted affidavit of the plaintiffs' solicitor that the defendants, who were the well-known trade protection society, had published the circular which was alleged to be defamatory to more persons than the one person specified in the statement of claim. In these circumstances the Court of Appeal in the exercise of its discretion decided that the plaintiffs ought to be allowed to obtain by discovery the names of the other persons to whom the circular had been published. Neither the Court of Appeal nor the House of Lords laid down any general principle such as is contended for on behalf of the plaintiff. No special circumstances exist in the present case, and it would be most oppressive if a mere allegation in a statement of claim of publication to unknown persons was held to justify interrogatories such

(1) 52 Sol. J. 580, and post, p. 200.
(2) [1902] 1 K. B. 870.
(3) [1905] 1 K. B. 653.
(4) [1911] 2 K. B. 543.

as these. [He read the shorthand note of the judgments of the Court of Appeal in *Russell* v. *Stubbs, Ld.* (1)]

Stewart replied.

KENNEDY L.J. In my opinion the order of Bucknill J. disallowing all these interrogatories (with the exception of the first) was rightly made. It appears to me that they are fishing interrogatories administered with the intention of ascertaining by minute examination whether the plaintiff can find out some cause of action against the defendant other than the specific cause of action alleged in the statement of claim. Speaking from memory I should have said that no authority could be found which would justify the second and third interrogatories or the inclusion in the statement of claim in an action for defamation of a paragraph alleging publication to unknown persons. But it is said that by reason of the decision of the House of Lords in *Russell* v. *Stubbs, Ld.* (2) these interrogatories can be supported, and that similar interrogatories were allowed in a subsequent unreported case of *Frere* v. *Frere*. Of course if the House of Lords did give a decision to that effect this Court will loyally conform to it. The decision of the House of Lords is reported only in the *Solicitors' Journal* and in a somewhat summary form, but we have been supplied with copies of the shorthand notes of the judgments delivered in the Court of Appeal, which were affirmed in the House of Lords, and on reading those judgments it becomes quite clear that that case was treated as an exceptional case, depending on peculiar facts which are altogether absent from the present case.

Russell v. *Stubbs, Ld.* (2) was an action for libel, the alleged libel being contained in a circular relating to the plaintiffs issued by the defendants. Publication of the circular was alleged to have been made to one person who was named and to other persons who were unknown to the plaintiffs. An affidavit had been filed by the plaintiffs' solicitor which afforded prima facie evidence, and which was not contradicted, that the circular had been published to other persons, and it was therefore held to be just that the plaintiffs should be permitted to ascertain who

(1) Post, p. 200. (2) 52 Sol. J. 580, and post, p. 200.

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those other persons were. It was on that ground that this Court distinguished the case from the class of case, such as this case is, where it is sought to administer interrogatories of a fishing character. In the present case there is nothing before the Court to shew any foundation whatever for the suggestion that the defendant has uttered any defamatory statements of the plaintiff beyond the one particularized in the statement, and the plaintiff is endeavouring by means of these interrogatories to find out whether at any time during a period of three years the defendant has said the same thing or substantially the same thing to other persons. The plaintiff's application is not based on sworn evidence as to there having been other publications, as was the case in *Russell* v. *Stubbs, Ld.* (1), but on a mere allegation unsupported by evidence.

It is said that the interrogatories are permissible because paragraph 5 of the statement of claim has not been struck out, but whether it ought or ought not to be struck out, the Court will not allow fishing interrogatories founded on an allegation in a statement of claim because the defendant has not troubled to have it struck out. In my opinion these interrogatories are oppressive and cannot be allowed. It is, I think, a little unfortunate that the judgments in *Russell* v. *Stubbs, Ld.* (1) should not have been more fully reported, particularly as the writers of text-books appear to have drawn the inference from these judgments as reported in the *Solicitors' Journal* that the decision of the House of Lords is an authority for the general propositions that the statement of claim in an action for defamation may contain an allegation of publication to persons unknown and that the plaintiff may then interrogate the defendant as to whether he has published the defamatory matter to any other and what persons. As I have already said, that case was treated in this Court and in the House of Lords as an exceptional case depending on special facts, and therefore it cannot be regarded as an authority for any general proposition of that sort. Of course if a plaintiff can satisfy the Court that there has in fact been a publication to other persons whose names are unknown to the plaintiff, *Russell* v. *Stubbs, Ld.* (1) is an authority that the

(1) 52 Sol. J. 580, and post, p. 200.

defendant can be interrogated as to the names of those other persons, but that is not this case.

With regard to the other interrogatories I think that the decision in *Elliott* v. *Garrett* (1) went as far as this Court ought to go in allowing interrogatories of this kind, especially when one bears in mind the more recent decision of this Court in *Maass* v. *Gas Light and Coke Co.* (2) In the present case the interrogatories are not framed in a general form, as was the case in *Elliott* v. *Garrett* (1), but are so drafted as to constitute a minute inquiry into a number of matters which may possibly become relevant on the question of privilege, the object being to shew that the defendant was actuated by malice. In my opinion these interrogatories also are most oppressive, and if we were to allow them we should be assisting the plaintiff in her endeavour to make out a case by obtaining admissions from the defendant as to matters which will not necessarily arise at the trial, for justification as well as privilege is pleaded in the defence. In my opinion we should be going far beyond any of the authorities if we were to allow these interrogatories.

For these reasons I am of opinion that this appeal must be dismissed.

FARWELL L.J. I am of the same opinion. Kennedy L.J. has been good enough to deliver judgment first in this case because he was a party to the decision of *Russell* v. *Stubbs, Ld.* (3) With regard to the present case I only desire to say that these interrogatories are as striking an example of fishing interrogatories as I have ever seen; counsel admitted this, but contended that there was no objection to fishing interrogatories. I do not agree with him.

When one looks at the "reasons" stated in the plaintiffs' case in the House of Lords in *Russell* v. *Stubbs, Ld.* (3) it is quite clear that all that the House of Lords decided in that case was that the Court of Appeal had rightly exercised its discretion on the very special facts which were proved by the uncontradicted affidavit of the plaintiffs' solicitor. The only report of the case is the report

(1) [1902] 1 K. B. 870. (2) [1911] 2 K. B. 543.
(3) 52 Sol. J. 580, and post, p. 200.

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of the House of Lords decision in the *Solicitors' Journal*, and as it appears that the effect of the decision has been misunderstood, I think it is desirable that a full report of the judgments of the Court of Appeal as well as the decision of the House of Lords should be published. Although we do not usually allow notes of cases to be cited, it is difficult to disregard the note of a case which has got into the text-books.

Appeal dismissed.

Solicitors for plaintiff: *Hatchett, Jones & Co., for Watson & Everitt, Lowestoft.*

Solicitors for defendant: *Heywood & Ram, for Cross, Ram & Sons, Halesworth.*

F. O. R.

RUSSELL AND ANOTHER *v.* STUBBS, LIMITED.

Court of Appeal, April 9, 10, 1908.

THIS was an action for libel. The plaintiffs carried on business in partnership as engineers. The defendants carried on business as the proprietors of *Stubbs' Weekly Gazette*, and for the purpose of their business the defendants made inquiries and obtained information for their subscribers as to the financial status and position of persons engaged in trade and furnished reports thereon to their subscribers.

The alleged libel was contained in a report made by the defendants as to the plaintiffs and the financial position of their business and was alleged to have been published on or about December 21, 1907, and/or on some other day in December, 1907, prior to December 24. Paragraph 4 of the statement of claim was as follows: "The persons to whom the said libel was published are the following:—One Staniforth and a company called Milestone & Staniforth, Ld., and some clerk or employee of the said company, whose names are unknown to the plaintiffs. The plaintiffs believe that the said libel was published to some other persons whom they cannot specify, but they will rely upon the publication thereof to every person to whom they may discover it was published."

The defendants issued a summons for further directions asking, inter alia, "1. That the portion of paragraph 4 of the statement of claim beginning at the words 'the plaintiffs believe' down to the end of such paragraph be struck out on the ground that the same is contrary to the rules of pleading and is vexatious and is not bona fide and tends to prejudice embarrass or delay the fair trial of this action. 2. Alternatively that the plaintiffs may be ordered to give full particulars of the other persons to whom the libel complained of is alleged to have been published, giving the names and addresses of such persons or person, and the date or dates of such publication or publications and how and in what manner published, and that in

default of such particulars the plaintiffs may be precluded from giving evidence at the trial as to such alleged publications."

On the hearing of this summons, Master Wilberforce made the following order:—"No order is made as to paragraph 4 of the statement of claim, except that the plaintiffs are not to be at liberty to give evidence as to any other publication of the words alleged unless they give particulars before giving notice of trial."

The defendants appealed to the judge from this order, and Lord Coleridge J. ordered that the words in paragraph 4 of the statement of claim from "the plaintiffs believe" to the end of the paragraph be struck out unless amended in seven days; if amended, particulars to be given of defamation and publication within seven days, otherwise no evidence to be given of same at the trial unless particulars given before notice of trial by leave.

The plaintiffs gave notice of appeal to the Court of Appeal, asking that the order of Lord Coleridge J. might be reversed and that the order of Master Wilberforce might be restored, or that the said order of the learned judge be suspended and the times therein mentioned might be enlarged, pending the administration of interrogatories and the obtaining of discovery from the defendants by the plaintiffs, and that the plaintiffs might have leave to deliver to the defendants interrogatories as to whether they published the libel complained of to some person other than the parties named in the statement of claim.

On the hearing of the appeal an affidavit by the plaintiffs' solicitor was read, which contained the following passages:—"On December 21, 1907, one Claude Cecil Staniforth telephoned to me at my office. The said Staniforth is the manager of Messrs. Milestone & Staniforth, Ld., who carry on several fish and general store shops in the west end of London, some of which businesses are carried on under the name of Milestone & Staniforth and some under different names. . . . . The said Staniforth said to me through the telephone that he had heard that the defendants had issued a bad account or report about the plaintiffs' firm, and he told me what it was, and appeared to be reading out to me something in writing. I cannot charge my memory with whether he said he had personally received such account or report from the defendants or not. What he told me the defendants had reported of the plaintiffs was in words identical with the libel set out in the statement of claim. The said Staniforth will not show me any report from the defendants nor give any further information to me in the matter. I have therefore no knowledge whether the defendants issued the report to the said Staniforth either in his own name or in the name of his company or any of the businesses carried on by them, but I submit it is perfectly clear that the defendants did publish the libel either to the said Staniforth or to some one else from whom the said Staniforth heard of it, and I so submit for the following reason. In consequence of what the said Staniforth said to me my firm caused an enquiry to be made on December 21, 1907, from the defendants for a report concerning the plaintiffs' firm, and on December 27, in reply to that enquiry, my firm received a report in words identical to those which the said Staniforth had given to me through the telephone on December 21, 1907. . . . . It is not possible for my clients and for my firm as their solicitors to give further particulars than those contained

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in the statement of claim until after discovery by or administering interrogatories to the defendants."

Gore-Browne, K.C., and *Frank Gover*, for the plaintiffs.
M. Lush, K.C., *McCardie*, and *McKenna*, for the defendants.

SIR GORELL BARNES, PRESIDENT. This is an appeal from an order of Lord Coleridge J. varying an order of the Master. The action is for a libel of the plaintiffs in the way of their business said to have been published on or about December 21, 1907. [The President read paragraph 4 of the statement of claim.] After the statement of claim had been delivered, an application was made by the defendants for an order to strike out the latter part of that paragraph, or for particulars, and the Master made an order the effect of which was to allow the statement of claim to stand, to require the defendants to put in a defence so as to enable the plaintiffs to get discovery, after which, if before giving notice of trial the plaintiffs found out anything of which further particulars under paragraph 4 were required, they would be in a position to give them. The defendants appealed to the judge and he varied the Master's order. [The President read the order of Lord Coleridge J. set out above, and continued:] The effect of that order, as I read it, would be to compel the plaintiffs to give the particulars before the defendants had delivered their defence, and, therefore, before the plaintiffs could get discovery on which to frame their claim and to give the notice which the Master thought it was sufficient for them to do. The plaintiffs appeal from that order of the judge and the question raised is one of considerable importance. The position is this, the plaintiffs are able to specify particularly certain persons to whom they allege publication of the words complained of (which were in the nature of information about the plaintiffs' trade position) was made, and they believe that the same information was also given to other persons, but at present they do not know and cannot find out who those other persons are. That this is the case is shewn by the affidavit of the plaintiffs' solicitor. [The President read the affidavit, and continued:] Mr. Lush, for the defendants, does not object to paragraph 4 of the statement of claim so far as it is confined to publication made to Staniforth or to some of the companies with which he is associated or to some clerk or other connected with those companies. The substantial objection is to the plaintiffs being allowed to aver that the libel has been published to some other persons whom they cannot specify.

In order to decide this appeal in favour of the plaintiffs we must, in my opinion, be reasonably satisfied, from the materials before us, that the latter part of paragraph 4 of the statement of claim is not a mere fishing allegation on the part of the plaintiffs, in connection with which they wish to get discovery before going on with the case, but that it is a bona fide allegation of a fact which they hope to be able to prove. Having regard to the statements in the affidavit of the plaintiffs' solicitor, and to the fact that there is no affidavit in answer suggesting that the affidavit is misleading or erroneous, or denying that there has been any publication at all, my view is that the plaintiffs' application cannot be treated as a fishing application. In speaking of it as the plaintiffs' application I am putting the matter the wrong way round. It is really the defendants' application that we are dealing with,

but the substance of the matter is that if the plaintiffs are right in their contention they will be entitled to apply for discovery as soon as the defence is put in, and, therefore, although in form the application is one by the defendants to strike out the latter part of paragraph 4 of the statement of claim or to obtain particulars, it is intended to meet in advance the application for discovery which the plaintiffs will make in order to enable them to give the particulars. That being so, the real question which we have to determine is whether there is anything unreasonable in allowing the plaintiffs to have discovery which will enable them to shew that this libel was published to somebody whom they specify or to other persons who have had exactly the same information sent to them by the defendants. Although the point may perhaps not be exactly covered by any of the authorities which have been cited to us and may to some extent be said to be novel, I think that having regard to the position of the parties, the plaintiffs being engaged in a trade and having information given about them by the defendants, whose business it may be to give information of that kind, if it is alleged that that information was given to some specified person or company, but with uncertainty on the part of the plaintiffs as to whether they can clearly establish that it was given to the particular person specified or to some clerk or person connected with the company, there is no hardship on the defendants or unreasonableness in placing the plaintiffs in the position of being able to say, "We are going to prove this, and, from the discovery which we expect to get from you, we also intend to prove that you published the report in identical terms at the same time to some other person or persons." To my mind that is not unreasonable, and I think it is within the principle which has been discussed and laid down in several of the cases, and I cannot myself see that it inflicts any hardship whatever upon the defendants. They must know perfectly well whether they have published this alleged libel, and to whom, if any one, they have published it, and the allegations in the latter part of paragraph 4 of the statement of claim can present no difficulty or embarrassment to the defendants in framing their defence. They may say that they did not publish the report to any one, or that they did publish it and it is true, or that they only published it to persons on occasions which made it a privileged communication. I cannot see that the defendants will have any difficulty whatever in meeting the plaintiffs' case, no matter to whom publication was made, provided that it is confined, as the plaintiffs' counsel have stated in this Court that they are content it should be confined, to publication at the particular time and in the express and particular terms set out in the statement of claim. In my opinion the order made by the learned Master was right. The order of the learned judge must be reversed and the order of the Master restored.

KENNEDY L.J. To my mind this is unquestionably a difficult case, but I have come to the same conclusion as the learned President. It is no doubt important, in the interests of the due administration of justice, that, especially in actions for defamation, the Court should not allow anything which can properly be considered as a fishing application made for the purpose of maintaining an action or of bringing further actions. The same principle applies to a question of this kind as applies to questions which

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sometimes arise as to the propriety of interrogatories; and I adopt what was said by Lord Esher M.R. in *Hennessy* v. *Wright* (1) with reference to interrogatories: "The moment it appears that questions are asked and answers insisted upon in order to enable the party to see if he can find a case, either of complaint or defence, of which at present he knows nothing, and which will be a different case from that which he now makes, the rule against 'fishing' interrogatories applies."

If I thought that Mr. Lush was justified in describing this as a bogus or sham action or a merely fishing case, I should agree that the order made by Lord Coleridge J. was a right order; but to my mind that is not a true or just description of the position. The plaintiffs bring an action for libel and they set out in the statement of claim the precise words of which they complain. They are traders and they allege that those words cast a very serious imputation upon them. The plaintiffs' solicitor has sworn in an affidavit, which the defendants have not answered, that precisely the same words were used by the defendants in a report referring to the plaintiffs supplied by the defendants to the solicitor in answer to an application by him. It is also stated in the affidavit that the same words were orally used in a telephonic communication by a person named Staniforth, who appeared to be reading something which was in writing. It seems to me that in these circumstances it cannot be said that the action is a fishing action, for the plaintiffs give prima facie evidence that the defendants made a statement, the statement is set out in the statement of claim, and it is sworn, and not denied, that a precisely similar statement was sent by the defendants to the plaintiffs' solicitor. Thus, this is an action for defamation founded upon prima facie evidence of publication by the defendants at the time alleged, as to which it is no doubt open to the defendants to rely on one or more of the defences suggested by my Lord; and the only way in which it can possibly be suggested that the action is a fishing one is that the plaintiffs are not in a position to be certain at the present time as to the person to whom the report was addressed by the defendants and as to how it got to Mr. Staniforth. Those are the only two things in doubt. It is not as if the plaintiffs were asking for a cause of action and were seeking to ascertain whether the defendants had ever published anything defamatory of them, or in what year or at what time they did so, for the statement of claim is confined to a particular date in December, 1907. Nor are the plaintiffs asking, did the defendants publish these words or anything like these words, for they confine themselves quite rightly, and ought to confine themselves, to the precise words which, it is sworn, have been used by the defendants in answer to the inquiry made by the plaintiffs' solicitor, and which have been repeated orally by a person who, there is strong evidence to shew, somehow or other got them from some one to whom the defendants had sent the same report. It therefore seems to me impossible to treat this case as a sham or bogus action depending on the success of a fishing application. I do not say that this case is not in some ways a novel one, and no case has been cited to us in which the facts were quite the same, but the principle is well established, and the question is, is this a fishing or bogus action or not? The defendants have not put in any affidavit denying the truth of any of the

(1) (1888) 24 Q. B. D. 445, n.

allegations which have been made and which, not being denied, clearly bring home to them a publication in one instance at any rate, and therefore it is hardly fair to describe the plaintiffs' claim as a sham or bogus claim, because if in the opinion of a jury the report is defamatory it is immaterial, except on the question of damages, to whom it was published, if it was in fact published to somebody. It seems to me, therefore, that if the defendants, being unable to deny a publication of the words complained of to some one, say in effect that they will put the plaintiffs in the difficulty of not being able to prove to whom the publication was made, it is right and proper that an opportunity should be given for the real facts to be ascertained, not for the purpose of shewing whether there was a publication of defamatory words, but for the purpose of shewing to whom the publication was made. There can be no reason why the plaintiffs should not be enabled to obtain that information so that the case may be dealt with on the merits. Of course if there was any decision on the point of law binding upon us or conflicting with the view which I have expressed we should be bound to follow it, but it seems to me there is no precedent to this case, nor has any authority been referred to which supports the contention of the defendants. It is common ground that a merely fishing application ought never to be allowed, but for the reasons which I have given this action cannot be regarded as being in the nature of a fishing application, and therefore in my opinion the proper course to follow is to set aside the order of Lord Coleridge J. and to restore the order of the Master.

Appeal allowed.

The defendants appealed from this decision to the House of Lords.

The plaintiffs' "reasons" why the decision of the Court of Appeal should be affirmed included the following:

(1.) Because upon the evidence it appears that the appellants have in fact published the words complained of to some person or persons known to themselves, but not known to the plaintiffs, and there ought not to be a wrong without a remedy.

(2.) Because upon the particular facts of this case the Court of Appeal exercised its discretion judicially and rightly.

(3.) Because the facts as to which particulars are sought are within the knowledge of the appellants and not within the knowledge of the respondents, and cannot be discovered by them except from the appellants.

The appeal was heard on June 1, 1908, *nom. Stubbs, Ld.* v. *Russell and Another.*

The same counsel appeared.

LORD LOREBURN L.C. My Lords, I think this appeal ought to be dismissed. In form it relates to a question of pleading; in substance it involves considerations with regard to discovery.

The question is one of discretion—that is, judicial and instructed discretion—for it is undoubted that such a discovery can in some cases be allowed. In these circumstances it would, in my opinion, require a very strong case for this House to entertain an appeal from the Court of Appeal. But I ought to add, I think, that I agree with the Court of Appeal in this case. I think they were clearly right. This is a case in which a specific

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libel is alleged—in which the matter that is arrived at by discovery is wholly in the knowledge of the defendants. There is a prima facie case of the publication of the libel complained of by the defendants. A probability, from the nature of the business carried on by the defendants, that the statements would be made or sent to all who asked for them if they were subscribers, is established in fact by the circumstance that the defendants did make the same communication to the plaintiffs' solicitors when they asked for it. Under these circumstances I think, as I have said, that this is a case in which the discretion used by the Court of Appeal was perfectly sound, and it seems to me that I ought to say so. Therefore I move your Lordships to dismiss the appeal with costs.

EARL OF HALSBURY. My Lords, I am of the same opinion, and I do not want to add anything to what the Lord Chancellor has said beyond this, that what we are dealing with here are questions preliminary to a trial, and I for myself rather deprecate any sort of iron rule which prevents a learned judge doing what he may think to be justice in a particular case by any set of rules which are supposed to have been agreed to. That which is within his discretion and which is essentially a matter applicable to the particular case in hand must be looked to by him. It has been looked to by the very learned judges whose judgment we have before us on this occasion, and I for myself certainly should not think of interfering with the discretion they have exercised.

LORD JAMES OF HEREFORD. My Lords, I quite concur in almost exactly the terms which my noble and learned friend Lord Halsbury has used, and therefore I content myself with saying that I agree.

LORD ROBERTSON and LORD COLLINS concurred.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, June 1, 1908.

Solicitors for plaintiffs: *Wingfield & Blew.*
Solicitors for defendants: *McKenna & Co.*

F. O. R.

[IN THE COURT OF APPEAL.]

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DUNLOP PNEUMATIC TYRE COMPANY, LIMITED *v.* NEW GARAGE AND MOTOR COMPANY, LIMITED.

Practice—Assessment of Damages by a Master—Appeal from Master—Court to which Appeal lies—Order XXXVI., *r.* 57.

In a case where there had been a reference of the amount of damages to a Master under Order XXXVI., r. 57, and notice of appeal to the Court of Appeal against his assessment of the damages had been given:—

The Court of Appeal were of opinion that an appeal lay from his assessment of the damages to that Court direct, and, therefore, gave leave to enter the appeal.

APPLICATION to the Court of Appeal to enter an appeal under the following circumstances.

In an action for breaches by the defendants of a contract by which they agreed that they would not sell or offer motor tyres, covers, or tubes manufactured by the plaintiffs to certain customers and firms at prices below those mentioned in the plaintiffs' price list current at the time of the sale, and that they would pay to the plaintiffs, for every tyre, cover, or tube sold or offered in breach of the contract, 5*l.*, as liquidated damages, the plaintiffs claimed an injunction to restrain the defendants from future breaches of the contract and damages. Phillimore J., before whom the action was tried without a jury, gave judgment for the plaintiffs for an injunction, and for damages, the amount of which he ordered to be ascertained by a reference to a Master, as being "substantially a matter of calculation," under Order XXXVI., r. 57. (1)

(1) Order XXXVI., r. 57, provides that: "In every action or proceeding in the King's Bench Division in which it shall appear to the Court or a judge that the amount of damages sought to be recovered is substantially a matter of calculation, it shall not be necessary to issue a writ of inquiry, but the Court or a judge may direct that the amount for which final judgment is to be entered shall be ascertained by an officer of the Court, and the attendance of witnesses and the production of documents before such officer may be compelled by subpœna, and such officer may adjourn the inquiry from time to time, and shall indorse upon the order for referring the amount of damages to him the amount found by him, and shall deliver the order with such indorsement to the person

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The damages were accordingly assessed by the Master, and, the amount found by him having been indorsed upon the order referring the assessment of damages to him, judgment was entered in the action for the injunction and for damages to the amount so found.

The defendants gave notice of application to the Court of Appeal, by way of appeal from the Master, to set aside the assessment of damages by the Master on the ground that he had wrongly held that the sum of 5*l.* mentioned in the contract was liquidated damages, and not a penalty, and to set aside so much of the judgment entered as related to damages. They refused in the Office to enter the appeal on the ground that the notice of appeal was out of time, having been given on the supposition that the appeal was a final appeal, whereas it was an interlocutory appeal. No objection was raised by counsel for the plaintiffs before the Court of Appeal to the extension of the time for appealing.

Morton Smith, for the defendants, in applying for leave to enter the appeal in the Court of Appeal, stated that a doubt existed as to whether the appeal lay to the Court of Appeal direct, or to the Divisional Court in the first instance, as in such cases as *Fraser* v. *Fraser* (1) and *Blair* v. *Clark*. (2) He cited *William Radam's Microbe Killer Co., Ld.* v. *Leather* (3), in which case it was held that, where there had been an assessment of damages by a jury under a writ of inquiry, an application for a new trial must be made to the Court of Appeal, and relied upon the concluding words of Order xxxvi., r. 57.

W. J. Disturnal, for the plaintiffs, raised no objection to the application, provided it were granted without prejudice to his right to object to the hearing of the appeal on the ground that it was not open to the Master to go into the question whether the

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entitled to the damages, and such and the like proceedings may thereupon be had as to taxation of costs, entering judgment and otherwise, as upon the finding of a jury upon a writ of inquiry."

(1) [1905] 1 K. B. 368.
(2) [1908] 2 K. B. 548.
(3) [1892] 1 Q. B. 85.

sum of 5*l.* mentioned in the contract was liquidated damages, or a penalty.

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The COURT (Vaughan Williams L.J., Farwell L.J., and Kennedy L.J.) were of opinion that the appeal lay to the Court of Appeal, and therefore granted the application.

Solicitors for plaintiffs: *John B. & F. Purchase.*
Solicitor for defendants: *John Hands.*

E. L.

HAAS *v.* ATLAS ASSURANCE COMPANY, LIMITED.

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Insurance (Life)—Foreigner domiciled Abroad—Life Policy effected with English Insurance Company—Right of Executor to recover Policy Moneys without taking out English Probate—Revenue Act, 1889 (52 *&* 53 *Vict. c.* 42), *s.* 19.

By s. 19 of the Revenue Act, 1889, "where a policy of life assurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a Court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy":—

Held, that the words "establish the right to receive" are applicable to legal proceedings in which the title to the money payable upon the policy is established.

Policies of life assurance were effected with an English insurance company by a foreigner who died domiciled in Switzerland. By the policies respectively three directors of the company whose hands were thereunto subscribed agreed that they would within three months after the decease of the assured should have been duly certified to the directors of the company at their principal office pay out of the stock and funds of the company to the executors and administrators or assigns of the assured the sums of 300*l.* and 700*l.* The plaintiff, who was the testamentary executor by Swiss law of the assured, brought an action (without taking out probate in the United Kingdom) against the insurance company to recover the amount due on the policies, and proved that by Swiss law he had the right to recover debts due to the estate of the deceased, including the sums due under the policies:—

Held, that the plaintiff was within the words "executors or administrators" in the policies; that he had established the right to receive

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the money payable in respect of the policies within the meaning of the section; and that he was therefore entitled to judgment for the amount less any English estate duties which might be payable thereon.

Quære whether the plaintiff was an assign of the deceased within the meaning of the policies.

ACTION tried in the Commercial Court before Scrutton J. without a jury.

The plaintiff, Theodore Haas, claimed as executor of the will of Wilhelm Haerle, deceased, to recover 1000*l.* as the amount payable under two policies of insurance on the life of the said Wilhelm Haerle, described in the policies as of Basle, Switzerland.

By the policies respectively (after reciting that "Wilhelm Haerle of Basle Switzerland wool merchant is desirous to effect an assurance with the Atlas Assurance Company upon his life") the three directors of the company whose hands were thereunto subscribed agreed that they should and would within three months after the decease of the said assured should have been duly certified to the directors of the defendant company at their principal office pay out of the stock and funds of the company to the executors, administrators, or assigns of the said assured the sums of 300*l.* and 700*l.*

Wilhelm Haerle died on August 13, 1912, domiciled in Switzerland, and left a will dated April 16 and 17, 1911, duly executed according to Swiss law. He made no disposition of the policies or moneys payable thereunder otherwise than by his will. All premiums on the policies had been duly paid. The plaintiff, who was Haerle's son in law, was appointed executor of that portion of the will which dealt (inter alia) with the policies.

By Swiss law (1) the plaintiff was the person who had the duty of collecting the policy moneys and had the power of giving a good discharge.

(1) Notarial Translation of Articles 518, 554, and 596 of the Swiss Civil Code (French version):

Art. 518. Extent of Powers. "Unless otherwise provided by the testator testamentary executors have the rights and obligations of the official administrator of an estate.

"They have to see to the observance of the wish of the deceased and especially to manage the estate, pay the debts, satisfy the legacies and to proceed to the division in accordance with the testator's instructions or in accordance with the law."

Art. 554. Official Administration

The plaintiff applied to the defendants for payment of the 1000*l.*, but the defendants alleged that they were not bound to pay until the plaintiff obtained a grant of representation from an English Court. They further said that by the policies the money was payable to the assured's executors, administrators, or assigns, that that meant English executors, administrators, or assigns, and that the plaintiff did not fill any of these capacities.

Maurice Hill, K.C., and *Iselin*, for the plaintiff. The effect of s. 11 of the Revenue Act, 1884 (1), as amended by s. 19 of the

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of the Estate. "The authority orders the official administration of the estate.

. . . . .

"4. In all other cases provided by law.

"When a testamentary executor has been appointed the administration of the inheritance is given to him."

. . . . .

Art. 596. Usual Method of Winding up. "The winding up comprises the settlement of the current affairs of the deceased, the carrying out of his obligations, the collection of debts due to him, the payment of the legacies within the measure of the assets and in so far as necessary the judicial recognition of his rights and liabilities, as also the realisation of the property.

. . . . ."

The following translation of an opinion given by Dr. Gustav Brodbeck, President of the Court of Appeal of the Canton of Basel (City), was referred to by the Court :—

"I reply to your inquiry of to-day respecting the authority of the testamentary executor to collect claims due to the estate by virtue of Swiss legislation as follows :—

"(1.) Unless otherwise provided under the will the testamentary executor named therein has the rights and is subject to the obligations of an official administrator of the estate and of an official liquidator of the estate (Article 518, section 1, of the Swiss Civil Code and explanation of the draftsman of the Law, Professor Eugen Huber, to the article).

"(2.) Unless otherwise provided by the will the testamentary executor therefore has not only to attend to the administration but also to the winding up of the estate (Article 518, section 2, Article 554 and Article 596 of the Swiss Civil Code).

"(3.) The winding up acts which the testamentary executor is entitled to perform also comprise, in the terms of Article 518, and according to the wording of Article 596 of the Swiss Civil Code, the collection of claims due to the estate."

(1) Revenue Act, 1884 (47 & 48 Vict. c. 62), s. 11 : "Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a Court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person

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Revenue Act, 1889, is to establish an exception to the general law that the only person entitled to give a good discharge for money payable to the deceased's estate is a person having an English right of representation. By s. 19 of the Revenue Act, 1889, the proviso to s. 11 of the Revenue Act, 1884, was repealed, and the section is to be read as if it enacted that "where a policy of life assurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a Court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy." The effect of s. 19 of the Act of 1889 is to abolish the necessity of the production of English probate and to make the decision in *Attorney-General* v. *New York Breweries Co.* (1) inapplicable. The defendants cannot, having regard to s. 19 of the Act of 1889, become executors de son tort as did the defendants in *Attorney-General* v. *New York Breweries Co.* (1), nor can they be liable again to English creditors of the deceased if they pay the plaintiff the amount of the policies: *Wankford* v. *Wankford.* (2)

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situated in the United Kingdom. Provided that, where any insurance company is authorised by a local or private Act of Parliament to pay money in respect of any policy of life insurance on production of a grant of representation obtained in the Empire of India or in any of the colonies, the production of a grant of representation from a Court in the United Kingdom shall not be necessary in case the policy was effected before the first day of July one thousand eight hundred and eighty-four. Nor shall such production be necessary in case the policy was effected on or after the said day if the company shall, before paying such money, have deducted therefrom, and paid to the Commissioners of Inland Revenue, the amount which would have been payable for duty in respect of the money if there had been a grant of representation from a Court in the United Kingdom."

Revenue Act, 1889 (52 & 53 Vict. c. 42), s. 19: "The proviso to section eleven of the Revenue Act, 1884, is hereby repealed, and that section shall read as if the following proviso were therein inserted in lieu of the repealed proviso:

"Provided that where a policy of life insurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a Court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy."

(1) [1898] 1 Q. B. 205.

(2) (1702) 1 Salk. 299.

They are not liable to pay estate duty on the 1000*l.*, for any liability to pay cast upon them by s. 11 of the Revenue Act, 1884, was abolished by the proviso to s. 19 of the Revenue Act, 1889.

The contract contained in the policies is to pay "executors administrators or assigns." That expression includes foreign as well as English executors, administrators, and assigns. The plaintiff is certainly the executor of the deceased and probably an assign. Even in the case of an Englishman there would be no reason to limit the expression to English executors, administrators, and assigns, and it follows that there can be no reason in the case of a foreigner who upon the face of each policy is expressed to have a foreign domicil. An assign means a person who stands in the position of the assured after his death and is entitled to enforce his rights. [*Lee* v. *Abdy* (1) was also referred to.]

Leslie Scott, K.C., and *Sims Williams*, for the defendants. If the defendants are liable to pay to the Crown any duty it could only be estate duty under s. 8, sub-s. 4, of the Finance Act, 1894 (57 & 58 Vict. c. 30), although it is very doubtful if that section applies, as they are merely debtors to the deceased's estate, and that case is not mentioned in the sub-section.

The expression "executor" in the policies means an English executor. Apart from the Revenue Act, 1889, an executor cannot recover in an action without production of the English probate, although he can commence it. Even though by Swiss law the property of the deceased passed to the plaintiff, that law would not be applicable as it does not regulate the procedure of these Courts: *Smith* v. *Milles*. (2) It is clear law that although an executor can commence an action he must produce probate before the trial: *Rex* v. *Inhabitants of Netherseal* (3); *Thompson* v. *Reynolds* (4); *Webb* v. *Adkins* (5); *Tarn* v. *Commercial Bank of Sydney* (6); *Whyte* v. *Rose* (7); *Enohin* v. *Wylie* (8); *Concha* v. *Concha*. (9) In *Attorney-General* v. *New York Breweries Co.* (10) A. L.

(1) (1886) 17 Q. B. D. 309.
(2) (1786) 1 T. R. 475.
(3) (1791) 4 T. R. 258.
(4) (1827) 3 C. & P. 123.
(5) (1854) 14 C. B. 401.
(6) (1884) 12 Q. B. D. 294.
(7) (1842) 3 Q. B. 493.
(8) (1862) 10 H. L. C. 1.
(9) (1886) 11 App. Cas. 541.
(10) [1898] 1 Q. B. 205.

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Smith L.J. said that "when either an executor has to justify what he has done as executor, or another has to justify what he has done at the request of an executor, each must prove that the executor was in fact the executor of the deceased, and this can only be done by production of the probate, for, as Jervis C.J. pithily put it in *Johnson* v. *Warwick* (1), when the will is proved, the Court has the legal optics through which to look at it." Those authorities justify the proposition that the fact that the plaintiff is executor cannot be proved, although he may occupy an analogous position abroad, without taking out probate. The debtor can if he chooses pay an executor who has not taken out probate, trusting him to subsequently do so, but the debtor runs the risk of having to pay twice over. It is clear that the policy money is estate within s. 1 and s. 2, sub-s. 1, clauses (*a*) and (*d*), of the Finance Act, 1894: *Attorney-General* v. *Murray*. (2) The insurance company would be in the position of having intermeddled with the deceased's estate if they dealt with the policy moneys in the manner the plaintiff contends they ought to.

Even though s. 19 of the Revenue Act, 1889, confers upon the defendants a discretion to pay the plaintiff, it casts no obligation upon them to do so. Sect. 11 of the Revenue Act, 1884, merely restores the common law, notwithstanding that it may have been varied by a local or private Act with regard to any insurance company. The section makes a grant of probate in the United Kingdom necessary in order "to recover or receive" the personal estate of a deceased person. In the proviso to s. 19 of the Revenue Act, 1889, the word "recover" is omitted, and the result is that although an executor of a foreigner can receive money payable in respect of a life policy and paid without any legal proceedings, he cannot recover it by action without a grant of probate in the United Kingdom. That result is reasonable because the insurance company can exercise its discretion as to whether it shall pay without the English probate. It is not likely that the Legislature intended to place upon an insurance company the risk of paying a foreign representative and of having to ascertain the foreign law. There is no evidence that

(1) (1856) 17 C. B. 516, at p. 522. (2) [1904] 1 K. B. 165.

the property of the deceased vested in the plaintiff; the opinion of the President of the Court of Appeal of Basel (City) only says that he is entitled to collect claims due to the estate.

[It was also contended that the plaintiff was not an "assign" of the deceased, but the Court gave no decision upon the point, and it is therefore thought unnecessary to give the arguments upon that question.]

Iselin in reply. Sect. 11 of the Revenue Act, 1884, refers not only to choses in action, but to chattels, and the word "recover" may well have been inserted in the section as being applicable to obtaining possession of them either with or without litigation. Sect. 19 of the Revenue Act, 1889, deals with choses in action only, and therefore the word "receive" is alone used. The effect of the words "executors administrators or assigns" is merely to confer upon the assured an absolute interest in the money secured by each policy but in expectancy on his own death. It is impossible to become an executor de son tort by doing an act authorized by statute. [Sect. 9, sub-s. 1, of the Finance Act, 1894, and *Embiricos* v. *Anglo-Austrian Bank* (1) were also referred to.]

SCRUTTON J. This is an action brought against the Atlas Assurance Company by Mr. Theodore Haas, who claims as executor of the will of the late Wilhelm Haerle the sum of 1000*l.* upon two policies of insurance on the life of Wilhelm Haerle for 700*l.* and 300*l.* respectively. The defendants in substance set up the defence that the plaintiff has not produced to them a grant of representation from a Court in the United Kingdom or established his right to recover as executor any of the property of the deceased. The two policies are in the same form and are to the effect that Wilhelm Haerle, described as of Basle, Switzerland, has paid a premium, and the three directors of the company who signed the respective policies agreed with him that in case he died they would out of the funds of the company within a certain period pay to his executors, administrators, or assigns the sums of 700*l.* and 300*l.* Haerle was a domiciled Swiss subject, and he died leaving a will by which he appointed

(1) [1905] 1 K. B. 677.

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the plaintiff Haas sole testamentary executor for a certain portion of his will, which includes sums due from the defendant company upon the policies of life insurance, the application of which he provides for.

There is evidence before me from a distinguished Swiss lawyer that by Swiss law, which is applicable to the will of the deceased, the testamentary executor has the rights and is subject to the obligations of an official administrator of the estate, which include the collection of claims due to the estate, and that consequently the plaintiff is the proper person to sue for any sum due to the estate of the deceased, including sums due upon these policies.

The law of England on the matter is as follows. Until 1884 an executor could not assert or rely on his right in any Court without shewing that he had previously established it in the Probate Division either by suit, by probate in solemn form, or in the ordinary form. The usual way in which he proved it was by the production of a copy of the will certified under the seal of the Court. That state of the law was described by Jervis C.J. in *Johnson* v. *Warwick* (1) as being that the Court had not the legal optics through which to look at the will until the will was proved in the form provided by English law. The practical consequence which applied equally to foreigners and to Englishmen was that if an insurance company insured the life of a foreign testator, in order to recover upon the policy, his representatives had on his death not only to go through all the forms of their own country, but had also to go through all the forms of England; and it is not unnatural to suppose that when a foreigner appreciated the fact that the effect of insuring with an English insurance company was that he would have two sets of probate forms to comply with instead of one, that state of things would operate to dissuade him from insuring with English insurance companies. Accordingly a number of insurance companies obtained private Acts of Parliament under which they bound themselves to pay without production of the English probate. The effect of that on the English revenue would obviously be that in cases where English duty was payable on the sum owing

(1) 17 C. B. 516, at p. 522.

from the insurance company the revenue authorities might never have a chance of collecting that duty, because they did not become aware through the medium of the probate of the will that it was payable.

I have no doubt that those two reasons led to the passing of s. 11 of the Revenue Act, 1884, which provided that "Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a Court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the persona estate and effects of any deceased person situated in the United Kingdom." To the enactment contained in that section there were two provisoes. The first was that if there had been a grant in India a grant in England should not be necessary in case the policy was effected before a certain date; the second was that the production of an English grant should not be necessary if the company had deducted from the policy money the sum due to the revenue and which would have been paid to the revenue if there had been an English grant.

It seems to me that the purpose of that enactment is clear. The object was, first, to benefit the insurance companies within certain limited conditions, and, secondly, to protect the revenue by securing that the probate duty should be paid.

Five years later an amendment was made in which it seems to me the main object was to secure the protection of English insurance companies, and the revenue was not so prominently before the attention of Parliament. Both provisoes to s. 11 of the Act of 1884, the proviso as to India and the proviso as to payment, were repealed, and the following proviso was substituted by s. 19 of the Revenue Act, 1889: "Provided that where a policy of life insurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a Court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect of such policy."

On behalf of the plaintiff it is said that he has established the

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right to receive this money, and that the former law which would have prevented him from establishing such a right unless he produced a grant of representation from a Court in the United Kingdom has been expressly repealed by s. 19 of the Revenue Act, 1889. In other words, the legal optics of the Court (to quote the phrase of Jervis C.J.) have been supplemented by statutory spectacles which enable the Court to see that which it could not see previously without the assistance of a grant of representation from a Court of the United Kingdom. On behalf of the insurance company Mr. Leslie Scott and Mr. Sims Williams, who have as usual argued the case with the greatest research and ingenuity, contend that the subtle beauty of s. 19 of the Revenue Act, 1889, deserves to be appreciated, and that when Parliament in 1884 used the phrase "recover or receive," and in 1889 only the word "receive," it did so in order to enact that the right to receive should be established without production of probate from a Court in the United Kingdom, but not the right to recover. In other words, that when you had established the right to receive without production of English representation, Parliament then said in effect: "But mind, though you have established the right to receive you cannot establish the right to recover till you have produced the grant of representation which we have excused you from producing with regard to the right to receive."

I am afraid I do not think Parliament was so subtle as that. I do not see any difference between the word "receive" and the words "recover or receive." The phrase "establish the right to receive" appears to me as applicable to the procedure in a lawsuit which establishes the plaintiff's title as the phrase "establish the right to recover"; and I am not able to come to the conclusion that the word "recover" was omitted from s. 19 of the Revenue Act, 1889, in order to prevent an action being brought unless probate was produced.

If that is so, what is the effect of the proviso in s. 19 of the Act of 1889? Policies of life assurance were effected with the Atlas Assurance Company by Haerle, who died domiciled in Switzerland. Has Haas, the plaintiff, established his right to receive the money payable in respect of the policies? He has proved that he is the testamentary executor by Swiss

law of Haerle, the deceased, and that by Swiss law such a person has the right to recover debts due to the estate. Those debts include the sums due under these policies.

In my view the plaintiff is within the words "executors or administrators" in the policies. I am rather disposed to agree with Mr. Iselin's contention that those words are somewhat superfluous. I think that if there is a contract to pay on a certain date the words "executors administrators or assigns" would not be necessary in order to enable a person who appeared on that date and was able to say "I am the legal personal representative of the promisee" to claim payment, and that the promisor would be compelled to pay him whether the words "executors administrators or assigns" were in the contract or not. It is, I think, merely the awkwardness in form of contracting that if Haerle should die the insurance company shall pay Haerle, who ex hypothesi is dead, that causes the words "his executors administrators or assigns" to be put into the contract, but I think the result would be just the same if "pay Haerle" was put in the contract. Whether that be so or not, I hold that the plaintiff Haas is within the words "executors or administrators." It is not necessary to decide that he is within the word "assigns." I am inclined to think that if he was driven to rely upon a claim as an assign he would have to fulfil the formalities of the Policies of Assurance Act, 1867 (30 & 31 Vict. c. 144); but I do not propose to decide the case upon that ground.

I decide that the plaintiff has established his right to receive the money, and having established his right to receive the money as an executor of Haerle, it appears to me that he is entitled to judgment for the sum, subject to this: In the absence of the Crown I do not think I ought to decide whether or not English estate duties are payable on the 1000*l.* I am inclined to think they are; and if so I think s. 9 of the Finance Act, 1894, gives a charge on the sum to the extent of the duties. As at present advised I think that if the insurance company retain a portion of the 1000*l.* equal to the duty they will not be in any way going beyond their legal rights. The insurance company can easily take steps to ensure that the Revenue

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Authorities shall put forward a claim to the duty if they so wish, by informing them that the money is in hand. I imagine that the insurance company would, in the event of a claim to that sum being made by the Authorities, interplead, and that the present plaintiff could come in and contest the claim of the Revenue Authorities to the duty if he so desired, and if he did not desire to contest the claim, the money could be paid to the Revenue Authorities. But as to so much of the insurance money as is not covered by the duties I hold that the plaintiff is entitled to recover it; and as the insurance company have failed in the point they have put forward, he must recover it with costs.

Judgment for plaintiff.

Solicitors for plaintiff: *Freeman, Haynes & Co.*
Solicitors for defendants: *G. F. Hudson, Matthews & Co.*

J. E. A.

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March 7, 19.

COINTAT *v.* MYHAM & SON.

[1912 C. 1219.]

Sale of Goods—Breach of Warranty—Sale of Diseased Meat to Butcher for Resale—Conviction of Purchaser—Loss of Trade—Measure of Damages.

The defendants, who were salesmen, sold to the plaintiff, a butcher, meat unfit for human food for the purpose of sale in his shop, he relying on their skill and judgment and not knowing that the meat was bad. The meat was seized in the shop by an inspector and ordered by a magistrate to be destroyed; and the plaintiff was convicted under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, of having the bad meat on his premises and was fined. In an action for damages for breach of warranty the jury awarded damages in respect of the fine and costs and also for loss of trade owing to the conviction:—

Held, that the plaintiff was entitled to recover the damages in respect of the fine and costs and for his loss of trade.

FURTHER CONSIDERATION of an action tried before Lord Coleridge J. with a jury.

The plaintiff, a butcher, brought this action against the defendants, who were meat salesmen, to recover damages for

breach of an implied warranty that the carcase of a pig bought by him from them was merchantable and reasonably fit for food. The carcase was in fact tuberculous and unfit for food. In ignorance of that fact the plaintiff exposed the carcase for sale in his shop, where it was seized by a sanitary inspector and adjudged by a magistrate to be unfit for food and destroyed. Subsequently the plaintiff was convicted under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, of having the carcase upon his premises and was fined 20*l.* and costs. The plaintiff claimed damages both in respect of the fine and costs and also for loss of trade owing to the conviction.

The jury found (1.) that the meat was not fit for sale as human food; (2.) that the plaintiff impliedly made known to the defendants the purpose for which the meat was required; (3.) that he did so in such a way as to shew that he relied on the defendants' skill and judgment; (4.) 36*l.* damages in respect of the fine and costs, and 200*l.* for loss of trade owing to the conviction.

Shearman, K.C., and *D. M. Kerly*, for the defendants.

Lewis Thomas, K.C., and *Ellis Hill*, for the plaintiff.

The arguments sufficiently appear from the judgment. In addition to the cases there cited, *Randall* v. *Raper* (1), *Addis* v. *Gramophone Co.* (2), *Hobbs* v. *Winchester Corporation* (3), *Mowbray* v. *Merryweather* (4), and *Robinson* v. *Harman* (5) were referred to.

Cur. adv. vult.

March 19. LORD COLERIDGE J. (6) In this case the jury found that the defendants sold the plaintiff a diseased pig with an implied warranty that it was fit for human food; that the plaintiff relied on the skill and judgment of the defendants; and that the plaintiff was entitled to damages: (1.) 36*l.* in respect of the payment of a penalty and costs of defence in and about a conviction for exposing bad meat; (2.) 200*l.* for loss of business due to the injury to his trade and custom.

(1) (1858) E. B. & E. 84.
(2) [1909] A. C. 488.
(3) [1910] 2 K. B. 46, 471.
(4) [1895] 2 Q. B. 640.
(5) (1848) 1 Ex. 850.
(6) The judgment was written.

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The plaintiff is prima facie entitled to be placed in the same position as if the contract had not been broken by the defendants. Damages must not be too remote. They are not too remote, if they arise naturally out of the breach of contract and if the damages sustained may fairly and reasonably be considered to have been in the contemplation of both parties as the probable result of the breach.

First, are the damages consequent on the conviction of the plaintiff too remote? I do not think so. The jury have in substance found that the defendants must have known that the plaintiff, relying on the implied warranty, would naturally expose the meat for sale, and that a conviction for so doing might reasonably follow without any negligence on his part. Although no doubt in one sense the plaintiff was in default in rendering himself liable to the law, yet absence of knowledge, absence of negligence, is no defence to the charge, and his conviction does not imply that he was negligent. If there is some ground for shewing that the fine was heavy on the ground of the absence of care on the part of the plaintiff, that might no doubt be some ground for deducting from the damages some portion of the fine; but the jury were entitled on the facts to find the whole 36*l.* if they thought it reasonably followed from the breach of warranty and was reasonably in contemplation of the parties, within *Hadley* v. *Baxendale* (1), and was not brought about wholly or in part by the plaintiff's own negligence: see *Crage* v. *Fry.* (2)

The next point is whether damage for loss of trade is too remote. If there were any case in which it had been held that under no circumstances can loss of trade come under the rule in *Hadley* v. *Baxendale* (1), I would follow it, but I can find none. In *S.S. Gracie* v. *S.S. Argentino* (3) loss of profits sustained by a ship not being able to go on a voyage owing to a collision was held recoverable. It is said the rule is different in cases of tort and breach of contract; but in *Marcus* v. *Myers* (4) loss of business through breach of contract to insert an advertisement was held recoverable. *Hammond* v. *Bussey* (5) is not a decision

(1) (1854) 9 Ex. 341.
(2) (1903) 67 J P. 240
(3) (1889) 14 App. Cas. 519.
(4) (1895) 11 Times L. R. 327.
(5) (1887) 20 Q. B. D. 79.

of this point, because there was clear express notice to the defendant that the plaintiff was reselling and repeating the warranty and the defendant repeated and insisted on the warranty. In *Jackson* v. *Watson* (1) damages were held to be recoverable by a husband where the defendant had supplied the husband with tinned salmon for the purpose of human consumption. The wife died and the husband recovered damages for the loss of the services of the wife. That was decided on the ground of the breach of warranty that it was fit for human consumption, and therefore it comes near though it is not identical in principle with this case. There is one case in the American Courts exactly in point, *Swain* v. *Schieffelin* (2) (which although not binding on me shews that it has been discussed and decided), where on a similar contract damages for loss of custom were held not too remote.

There are cases which at first sight indicate an opposite view; but they are all distinguishable. In *Holden* v. *Bostock* (3) no claim for loss of business was ultimately made, although a claim was made and succeeded for costs incurred in minimizing the loss to the plaintiff. It may be the reason was that no evidence was forthcoming to prove that the sugar, which was in fact used for brewing beer, was purchased under a warranty that it was fit for that purpose. It may be that for business purposes the plaintiff did not wish to expose his losses. In *Bostock* v. *Nicholson* (4) there was no warranty that the article purchased was fit for the purpose for which it was used. In *Watson* v. *Gray* (5) loss of business was held not recoverable because on the facts of that particular case the defendant could not reasonably be supposed to have had in contemplation that the plaintiff would suffer such loss of custom from the breach of the particular contract. This case is not inconsistent with *Marcus* v. *Myers* (6), for Kennedy J. was a party to both decisions.

The strongest case against the plaintiff's contention is *Fitzgerald* v. *Leonard*. (7) That case does not, in my opinion,

(1) 1909] 2 K. B. 193.
(2) (1892) 134 N. Y. 471.
(3) (1902) 50 W. R. 323.
(4) [1904] 1 K. B. 725.
(5) (1900) 16 Times L. R. 308.
(6) 11 Times L. R. 327.
(7) (1893) 32 L. R. Ir. 675.

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decide more than that in that particular case the damages for loss of custom in fact arose from the conviction and not from the breach of the warranty, and that the conviction of the plaintiff was not what the parties could reasonably have had in contemplation on the facts of that case. If it decides more than this, it is in conflict with the case of *Blake* v. *Fenner* (1), and I decline to follow it. That case was decided in the Court of Appeal on October 27, 1911, upholding a decision of mine that on a similar implied warranty damages for loss of custom could be recovered.

To sum it all up, the sound view appears to me to be this. The loss to a man's business may not be, and perhaps is not usually in contemplation between the parties as the possible consequence of a breach of contract, but where the party guilty of the breach of contract or warranty knows that the other party is relying on his fulfilment of the contract and knows the possible and probable consequences of such reliance, the damages caused to the other party by breach of his contract are recoverable by him. Where, as in this case, an article is supplied to a buyer to be used as food for his customers and that is known to the seller and the article is supplied for that purpose, in the absence of negligence on the part of the buyer I think he may recover for the loss of custom due to the breach of the contract by the defendant, under the principle laid down in *Hadley* v. *Baxendale* (2), on the ground that the special loss was in fact actually in the contemplation, or may be taken to have been in the contemplation, of the seller at the time of making the contract as the reasonable consequence of such breach.

I therefore give judgment for the plaintiff for the damages found by the jury under both heads.

Judgment for plaintiff.

Solicitors for plaintiff: *C. Groebel & Co.*

Solicitors for defendants: *Bower, Cotton & Bower.*

(1) Unreported. (2) 9 Ex. 341.

J. H. W.

BELL *v.* GIRDLESTONE.

1913
April 2.

Solicitor—Costs—Costs in Proceedings in County Court—Bill delivered to Client—Bill not taxed—Solicitor's Right to sue—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *s.* 118.

Sect. 118 of the County Courts Act, 1888, which prevents a solicitor recovering from his client costs incurred in a county court "unless they shall have been allowed on taxation," does not make taxation a condition precedent to the solicitor's right to sue for his costs even if the time within which the client is entitled to taxation has not expired.

Cubison v. *Mayo* [1896] 1 Q. B. 246, explained.

APPEAL from the Bedford County Court.

The plaintiff, who had acted as solicitor for the defendant in proceedings in the county court, delivered his bill of costs and, shortly after the expiration of one month from the date when the bill was delivered, commenced this action to recover his costs.

The defendant set up the defence that the plaintiff could not recover his costs because they had not been taxed as required by s. 118 of the County Courts Act, 1888. (1) The county court judge held that taxation under s. 118 was a condition precedent to the right to recover the costs, and gave judgment for the defendant.

The plaintiff appealed.

A. E. Woodgate, for the appellant. The last part of s. 118 of the County Courts Act, 1888, does not make it imperative that the bill of costs shall be taxed before the solicitor can recover the costs from his client. It only gives an option to either of them to apply for taxation by the registrar of the county court and provides that, if the costs are so taxed, the solicitor can only

(1) 51 & 52 Vict. c. 43, s. 118: ". . . . All costs and charges between solicitor and client shall, on the application either of the solicitor or client, but not otherwise, be taxed by the registrar of the Court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force, unless the registrar shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed; and no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation."

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recover the amount allowed on taxation. That was really the decision of the Court of Appeal in *Cubison* v. *Mayo* (1), which is therefore a direct authority and governs this case. The fact that in that case more than a year had expired since the delivery of the bill is not a material distinction, and it was only referred to in the judgments as an additional reason for the decision.

By s. 37 of the Solicitors Act, 1843 (2), a solicitor is prevented from suing for his costs until the expiration of one month from the delivery of a signed bill of costs, and s. 118 of the County Courts Act cannot be intended to have the effect of extending that period to a year in the case of costs incurred in a county court.

If at the hearing of the action the client desires to have the bill of costs taxed and the time within which he is entitled to taxation has not expired, the Court will give judgment for the amount found due upon taxation: *Smith* v. *Edwardes*. (3) The client, therefore, is fully protected by s. 118 without construing it to mean that taxation is a condition precedent to action.

W. A. Barton, for the respondent. The effect of s. 118 is that costs of this kind cannot be recovered by a solicitor unless there has been an application for taxation under the section, or unless a year has expired since delivery of the bill, in which case the client's right to taxation has gone. Upon a consideration of the judgments in *Cubison* v. *Mayo* (1) it is clear that the decision was based upon the fact that one year had expired since delivery of the bill and that the Court were of opinion that before the expiration of a year taxation was a condition precedent to the right to recover the costs. Apart from s. 118 a solicitor has no absolute right to have taxation of his bill, but that section gives him an absolute right, and it does so because in clear and express language it provides that he shall not recover his costs unless they have been taxed.

Woodgate replied.

CHANNELL J. This case raises a very puzzling question, which turns upon the true meaning of s. 118 of the County Courts Act, 1888, as interpreted by the Court of Appeal in *Cubison* v. *Mayo*. (1)

(1) [1896] 1 Q. B. 246. (2) 6 & 7 Vict. c. 73.
(3) (1888) 22 Q. B. D. 10.

The judgments delivered in that case undoubtedly cause considerable difficulty. The Court there had before it the bare point of law as to the meaning of s. 118, and I think that the learned judges decided it; but they went on to point out that for another reason justice was being done by their decision. Judges often do that, and there are often reported cases in respect of which there is a difficulty in separating those parts of the judgment which deal with the question of law involved in the case from other passages which were intended to shew that in the particular case justice was being done between the parties.

The question we have to decide is whether the words at the end of s. 118 of the County Courts Act, 1888, "and no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation," mean that no action shall be brought by a solicitor in respect of costs and charges incurred in a county court unless there has been a taxation of his bill by the registrar and then only for the amount allowed on taxation; that is to say, whether taxation is a condition precedent to the right to recover or whether it is not. That question came before the Court of Appeal in *Cubison* v. *Mayo* (1), which was a case in which there had been no taxation of costs and no application to tax, and the time within which the client could ask for taxation as of right had expired. I think that the Court of Appeal did decide that those words of s. 118 did not create a condition precedent to the right to bring an action upon the bill of costs. Unless the Court decided that, the learned judges must have somehow or other incorporated into the section some other words, which they would have had no right to do. It seems to me that the Court of Appeal came to the conclusion that this provision was not a condition precedent to the right to bring an action.

There is a statutory provision in the Solicitors Act, 1843 (s. 37), which prevents a solicitor suing his client for costs until the expiration of a month from the delivery of his bill. If the contention of the defendant is right, there would be an extension of that provision to a period of one year for no good reason which I can see.

I think that it was decided in *Cubison* v. *Mayo* (1) that the

(1) [1896] 1 Q. B. 246.

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provisions of s. 118 do not apply where there has been no taxation and no application for taxation. It is true that the Court went on to give additional reasons for the decision, but I think that we must treat it as a decision that the words of s. 118 do not create a condition precedent to bringing an action to recover costs. This appeal must, therefore, be allowed.

LORD COLERIDGE J. By s. 118 of the County Courts Act, 1888, it is provided [his Lordship read the last part of the section]. The case of *Cubison* v. *Mayo* (1) has placed an interpretation upon the last clause of that section. Under s. 37 of the Solicitors Act, 1843, the client has an absolute right to have his solicitor's bill of costs taxed within one month after it is delivered. In *Cubison* v. *Mayo* (1) not only was that right gone, but more than twelve months had elapsed since the delivery of the bill. That fact was, I think, referred to by the judges in the Court of Appeal in order to explain the circumstances and to shew that no injustice was being done by the decision. That case does not, in my opinion, decide that, if the twelve months have not expired, the client who has not applied for taxation can rely upon the last words of s. 118 as a defence to an action upon the bill of costs. In my opinion *Cubison* v. *Mayo* (1) decides that the last part of s. 118 does not apply where there has been no application for taxation and does not create a condition precedent to the right to sue upon the bill of costs. That case does not decide that the solicitor must wait twelve months before suing in order to see whether the client will apply for taxation or not. I think that the solicitor need not wait for more than one month after delivery of his bill before bringing an action and that the client cannot avail himself of the provisions of s. 118 as a defence to the action when there has been no application for taxation and no taxation.

Appeal allowed.

Solicitors for appellant: *Field, Roscoe & Co., for C. C. Bell, Bedford.*

Solicitors for respondent: *Hawks, Stokes & Sons, for Francis Shillitoe, Hitchin.*

(1) [1896] 1 Q. B. 246.

J. H. W.

WEEKS, Appellant *v.* ROSS, Respondent.

1913
March 17.

Ship—"Passenger Steamer"—"Vessel used in navigation"—Navigation—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 271, 742, 743.

A motor boat was used for carrying more than twelve passengers from Exeter along the river Exe for half a mile and for a further mile along a canal to the first lock, returning thence to Exeter. Below that lock the canal continued for two miles, through other locks, to the estuary of the river, and it was used by seagoing ships for the purpose of going to and from Exeter:—

Held, that the motor boat was a vessel "used in navigation" within the meaning of s. 742 of the Merchant Shipping Act, 1894, and was therefore a "passenger steamer" within s. 271.

Southport Corporation v. *Morriss* [1893] 1 Q. B. 359, distinguished.

Case stated by justices of Exeter.

Weeks laid two informations against Ross for offences under s. 271 (1) of the Merchant Shipping Act, 1894, as owner of two petrol-driven motor boats for having conveyed for payment more than twelve passengers on excursions without having a certificate from the Board of Trade as to survey of the boats.

Each boat plied for hire from the Exe bridge at Exeter along the quay for a distance of half a mile and into and along the Exeter Canal for a mile to a point known as the Double Locks, thence returning to the starting point. One boat carried twenty passengers and the other twenty-five passengers on the two occasions in respect of which the information was laid. One boat did not exceed twelve tons burden and the other was much smaller. No certificate had been obtained from the Board of Trade in respect of either boat. The river Exe at the points named is

(1) 57 & 58 Vict. c. 60, s. 271: "(1.) Every passenger steamer which carries more than twelve passengers . . . . (*b*) shall not ply or proceed to sea or on any voyage or excursion unless the owner or master has the certificate from the Board of Trade as to survey under this part of this Act, the same being in force, and applicable to the voyage or excursion on which the steamer is about to proceed."

Sect. 742: "In this Act . . . . 'ship' includes every description of vessel used in navigation not propelled by oars."

Sect. 743: "Any provisions of this Act applying to steamers or steamships shall apply to ships propelled by electricity or other mechanical power . . . ."

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not tidal, and is entirely fresh inland water confined by double locks which are more than two miles from tidal water. The mean width of the river is 150 feet with a depth of 12 feet, and the mean width of the portion of the canal in question is 30 feet with a depth of 13 feet. The canal, which has other locks below the said double locks, communicates between the estuary of the Exe and Exeter and is used by seagoing ships for the purpose of going to and from Exeter.

The appellant, Weeks, contended that the boats were passenger steamers plying on an excursion within s. 271 of the Merchant Shipping Act, 1894, and were "passenger steamers" within the meaning of s. 269. The respondent, Ross, contended that the Act did not apply to vessels used on inland waters, and that the boats were not "passenger steamers" within the meaning of the Act. The justices found that the boats were not vessels used in navigation on the sea, and they dismissed the informations.

Sir John Simon, S.-G. (*Ginsburg* and *G. A. H. Branson* with him), for the appellant. It is clear that the provisions of the Act apply to other than seagoing vessels. Some of the decisions which were cited before the justices have no bearing at all upon the question in this case: *Kiddle* v. *Kidston* (1); *Hedges* v. *Hooker* (2); *Ex parte Ferguson* (3); *The Mac.* (4)

These boats were vessels "used in navigation." "Navigation" may be on inland waters as much as on the sea. This canal exists for the purpose of navigation between the sea and Exeter, and these boats were navigated along the canal from one point to another. The facts in the case of *Southport Corporation* v. *Morriss* (5), upon which the respondent will rely, were wholly different from the facts in the present case. In that case there was only an artificial lake of small extent entirely unconnected with the sea or any other water, and the decision turned entirely upon the small size and the nature of the sheet of water.

J. A. Hawke, for the respondent. It must be admitted that

(1) (1884) 15 Cox, C. C. 379.
(2) (1889) 60 L. T. 822.
(3) (1871) L. R. 6 Q. B. 280.
(4) (1882) 7 P. D. 38, 126.
(5) [1893] 1 Q. B. 359.

these provisions of the Act apply to vessels which are not seagoing. These boats were not "vessels used in navigation" and therefore were not "passenger steamers" within the meaning of the Act. This case is governed by the decision in *Southport Corporation* v. *Morriss* (1), which is indistinguishable. It is a question of fact whether the vessel is used "in navigation" or not, and here the justices have found in favour of the respondent, and this Court cannot review their finding, there being evidence to support it. This part of the river and canal is in substance an enclosed sheet of water just as in the *Southport Case* (1) and is not much larger than the piece of water in question in that case.

Sir John Simon, S.-G., replied.

CHANNELL J. This appeal must be allowed. It is difficult to see exactly what were the grounds upon which the magistrates really proceeded, because they have stated many grounds in the case, some of which it is admitted quite frankly by Mr. Hawke have no bearing upon the matter.

The question is whether this case comes within s. 271 of the Merchant Shipping Act, 1894, which provides that "Every passenger steamer which carries more than twelve passengers shall . . . . not ply or proceed to sea or on any voyage or excursion with any passengers on board" unless it is certified by the Board of Trade. I think the main and real point that the magistrates meant to decide was that, in order to bring a vessel within that section, it must go to sea, and that the section did not apply to passenger launches used simply on inland waters. That was the real basis of their decision, although they stated some other points. Mr. Hawke has admitted that that decision was wrong, as it clearly was. That being so, the point about the register of the vessel being under fifteen tons has nothing in it.

The only other point is one of some difficulty and not easy to determine. It is raised by the case of *Southport Corporation* v. *Morriss* (1), which I think requires careful examination. That was the case of a pleasure lake, if I may call it so, at Southport. Southport is a place where the tide goes out a very long way.

(1) [1893] 1 Q. B.

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This lake was made in order that children and other people might amuse themselves with a sort of quasi-sea when the other sea had gone nearly out of sight. There was a small launch which was used for amusement and carried people, who certainly were passengers and were more than twelve. The Court decided that it was not within the Act. We have to see on what ground they so decided, and I think on looking at the judgment that there is no doubt what the ground was. Lord Coleridge C.J. said: "The launch in question cannot be held to be within the provisions of s. 318 [of the Act of 1854] unless it can be said to be a ship, for the section requires the duplicate certificate to be put up in a conspicuous part of the ship. And by s. 2 the term 'ship' is defined to include 'every description of vessel used in navigation not propelled by oars.' We are therefore reduced to the question whether this launch was a vessel used in navigation. I think that, having regard to the size of the sheet of water on which it was used, it was not. Navigation is a term which, in common parlance, would never be used in connection with a sheet of water half a mile long. The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn."

It is quite clear that that judgment proceeded entirely upon the view of the Court as to the place where the alleged navigation was, and the Lord Chief Justice says the term could never be used in connection with a sheet of water half a mile long. He must be considered to have used those words with reference to the facts of the case before him. It was not only a sheet of water half a mile long, but an enclosed sheet of water, so that a boat, or a vessel, could not be taken over that half a mile of water and proceed further on. That being so, I absolutely agree with that decision. A pleasure pond cannot be a place on which, in any reasonable sense of the word, any one could say there was navigation, and that is the ground upon which the Lord Chief Justice's decision proceeded. Charles J. agreed that "this launch, used in the place in which it was used, was not a vessel used in navigation within s. 2 of the Merchant Shipping Act,

1854, and therefore not a passenger ship within the meaning of ss. 303 and 318." Of course the sections of the Merchant Shipping Act, 1854, differ from those before us, because that case arose in 1893, the year before the present Merchant Shipping Act of 1894 was passed, but the sections are almost verbatim the same.

Now, does that decision apply to the present case, assuming that the matter is open for us to consider? I do not think there can be the slightest doubt that it does not apply. Here, although the length of water on which these launches ply is only about one-and-a-half miles from the Exe bridge to the first lock on the canal, which in a sense is an enclosed piece of water and if really so that might prevent this being navigation, yet it is not really so, because at the end of that mile and a half there is a lock which communicates with a further cut (to use an ambiguous expression) which goes on to another lock, and then there is a sea lock, through which vessels can go out to sea or can come in from the sea, and go up to the dock which exists at Exeter, where vessels of a substantial size in fact do go. Vessels are passing up and down this canal constantly, but, of course, only at a time of high water in the estuary, because outside the lock in the estuary there is no water at low tide, and they only go down to the lock to get to the sea when the tide is high. There is navigation there, and it is a place for navigation, and being a place for navigation it is not the less navigation by this launch than by any other craft; the launch is navigating. The grounds upon which the judges decided the *Southport Case* (1) do not in point of fact exist in the present case. No one could say that this place is a place where there could not be navigation when in point of fact there is a very considerable amount of navigation. On that ground, if the matter is open to us, there can be no doubt what our decision should be.

The only remaining question is whether the justices have found any findings of fact which we cannot review, and which preclude us in any way from allowing the appeal. I do not think they have. I do not quite agree with the Solicitor-General, who said that it was found as a fact that the vessel was used in navigation.

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It is somewhat ambiguous. My view of the facts is that the statement about the place is really conclusive. I think there is quite enough in this case for us to say that upon the facts found the case is not brought within the *Southport Case*. (1) That being so, there really is no difficulty upon the facts found here in holding that this was a case in which there clearly was navigation.

Upon these grounds I think the appeal must be allowed.

BRAY J. I am of the same opinion. The only real question is whether this vessel was used in navigation. Now the case finds that it proceeded for half a mile along the river Exe and for a mile along the canal, and that the canal continues over two miles, going through certain locks, and finally reaches tidal water. Those being the facts, whether the magistrates have found as a fact that it was used for navigation or not, in my opinion there could be no other proper finding than that the vessel was used for navigation. A river is a place for navigation and a canal is a place for navigation, and they are none the less places for navigation because as it happens this vessel only used a portion of them.

LORD COLERIDGE J. I am of the same opinion. I have had some difficulty in this case because the only point the magistrates had to decide was whether the vessels were used in navigation and there is no express finding on that point. The magistrates directed their attention to other and irrelevant points, as to whether the vessels were steamships, and as to whether they were used in navigation on the sea. The difficulty I have felt is that this Court must be satisfied that, apart from the findings of the magistrates, they have stated such facts as afford conclusive evidence that the vessels were used in navigation.

I do not think the *Southport Case* (1), which the magistrates thought bound them, is binding here, because in this case these vessels were proceeding over waters which were used by ships coming from the sea to the docks and back again. Clearly such ships would be held to be navigating these waters on the ground

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of the nature of the waters they were traversing. If ships coming to and from the sea were clearly navigating these waters, the fact that these particular vessels in question did not proceed to sea does not prevent these waters being navigated by them as they would be by ships going to and from the sea.

On those grounds I think there is conclusive evidence upon which conviction was a necessary result. I leave out of consideration various alternatives that might be suggested, such as the use of large reservoirs or small lakes or tarns. When those questions arise it will be time enough to decide whether those are waters which can be navigated.

Appeal allowed.

Solicitor for appellant: *Solicitor to the Board of Trade.*

Solicitors for respondent: *Field, Roscoe & Co. for Ford, Harris & Ford, Exeter.*

J. H. W.

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March 1, 11.

[1911 S. 379.]

Infant—Contract—Goods sold and delivered—Necessaries—Bill of Sale—Fraudulent Misrepresentation as to Age—Equitable Relief—Conversion—Infants Relief Act, 1874 (37 & 38 *Vict. c.* 62)—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31)—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43).

The defendant, an infant, by fraudulently representing that he was of full age, induced the plaintiff to sell and deliver to him certain furniture and effects of which she was the owner. The goods were not necessaries. They were assigned to the defendant by an instrument which was a bill of sale within the Bills of Sale Act, 1878. It contained a promise by the defendant to pay the purchase-money at a future date and a licence to the plaintiff to resume possession of the goods if the price was not then paid. After the purchase the defendant sold some of the goods for 30*l.* and, with the knowledge and assent of the plaintiff or her agent, granted a bill of sale of the residue as security for an advance of 100*l.* He failed to pay the purchase-money on the day named for payment. After he came of age judgment for the amount was recovered against him by default, and a receiving order following upon a bankruptcy notice was made against him. On an appeal the receiving order was set aside without prejudice to any action

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the plaintiff might be advised to institute for the purpose of enforcing any liability to which the defendant was subject in equity, or for having obtained the goods by false pretences.

In an action in which the plaintiff claimed by way of equitable relief that the defendant should be ordered to pay to her the reasonable value of the goods:—

Held, that in the circumstances the defendant was liable to account for the 30*l.* and 100*l.* which he had got by the sale and assignment respectively of the goods, and to pay the balance thereof over and above a certain sum which he was entitled to set off.

Evroy or *Esron* v. *Nicholas* (1733) 2 Eq. C. Ab. 488; 1 De G. & Sm. 118, n., and *Ex parte Unity Joint Stock Mutual Banking Association, In re King* (1858) 3 De G. & J. 63, followed.

Held, also, that the instrument under which the defendant acquired the goods was not a bill of sale within the Bills of Sale Act, 1882.

Held, further, that, notwithstanding the Infants Relief Act, 1874, the delivery of the goods to the defendant with intent to pass the property therein operated to vest the property in him, and that he was not liable for conversion of the goods.

A contract, being one entire contract, for the purchase of goods is not binding on an infant merely because the goods include certain articles which may be properly called necessaries, if they also include a substantial number of things that are not necessaries.

FURTHER CONSIDERATION before Lush J. after a trial before the learned judge and a common jury in the following circumstances.

The action was originally brought on a specially indorsed writ to recover a sum of 300*l.*, the price of goods sold and delivered, as hereinafter mentioned.

The defendant at the time of the sale and delivery of the goods was an infant. In February, 1911, the plaintiff recovered judgment by default. A bankruptcy notice founded on this judgment was subsequently served on the defendant, and, upon his failure to comply therewith, a petition in bankruptcy was in March, 1911, presented against him and a receiving order was made.

The defendant then appealed to a Divisional Court to have the receiving order rescinded and the petition dismissed on the ground of his infancy at the date of the sale. The plaintiff contended that the defendant, notwithstanding his infancy, was liable in equity on the ground that he had induced the contract of sale by fraudulently representing to the plaintiff or her agent that he was of age at the date of the sale. The Divisional Court made an order rescinding the receiving order and dismissing the petition

without prejudice to any action the plaintiff might be advised to institute for the purpose of ascertaining the alleged equitable liability of the defendant, or for the purpose of obtaining judgment against him for obtaining goods by false pretences; and in any such action the defendant was not to embarrass the proceedings by pleading the previous judgment in the King's Bench Division.

In pursuance of this order the plaintiff delivered a statement of claim in which she claimed amongst other things that the defendant should be ordered to pay to the plaintiff by way of equitable relief the reasonable value of the goods and chattels described below, which the plaintiff alleged that she had been induced to sell to the defendant by the fraud, misrepresentation, and concealment of the defendant, who, knowing that he was an infant at the time of the contract, fraudulently represented to the plaintiff that he was of full age at that time; and that the defendant should be ordered to indemnify the plaintiff against the loss and damage she had suffered by reason of the fraud, misrepresentation, and concealment of the defendant.

The defendant according to the evidence of his mother was born on December 21, 1889, and came of age on December 21, 1910. On December 10, 1909, being then entitled to a reversionary interest in a sum of about 3000*l.* which was expected to fall into possession in about a year, but being otherwise without substantial means, by an agreement in writing of that date he agreed to buy from the plaintiff all the furniture, pictures, musical instruments, chattels, and effects in or about the premises known as Clovelly, South Benfleet, Essex. The payment of the purchase-money, 300*l.*, was to be made on December 25, 1910, and the instrument authorized the plaintiff to resume possession of the goods and chattels if the defendant failed to pay. The goods in question comprised, among other articles, twenty-four candlesticks, thirty-eight weapons including a Chinese sword, ten daggers, and three flint-lock pistols; there were also among them sixty pictures, a Burmese bell, and twenty-three snuff-boxes.

Throughout the negotiations leading to this purchase the plaintiff's brother, one Arthur St. Claire Stocks, acted as her

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agent and conducted the transaction on her behalf. After the purchase the defendant sold some of the goods and chattels for a sum of 30*l.*, and, with the knowledge and assent of Arthur St. Claire Stocks, granted a bill of sale of the remaining goods as security for a loan of 100*l.* These goods were subsequently sold by the grantee of the bill of sale.

The learned judge having heard the evidence left to the jury certain questions. Those which are material to this report together with the answers thereto were as follows:—

(1.) Was the defendant under age on December 10, 1909? —Yes.

(2.) If so, was the fact known to Arthur St. Claire Stocks when the agreement was made?—No.

(3.) Did the defendant represent that he was of full age fraudulently to deceive Arthur St. Claire Stocks and the plaintiff? —Yes.

(6.) Was the furniture of the value of 300*l.*, or of what value?—Yes. 300*l.*

(7.) Were the goods necessaries?—Under the conditions stated, yes.

The foreman of the jury explained this answer as follows: "We find on the evidence that the defendant was going to be married."

(8.) Did the plaintiff bring the bankruptcy petition maliciously?—No.

The case having been set down for further consideration on these findings,

Farleigh and *A. F. Clements*, for the plaintiff. If these goods were necessaries, as the jury have found they were, the plaintiff is entitled to judgment for 300*l.*, the price of them.

Secondly, even if the goods are not necessaries, the fact is established that the defendant induced the sale and delivery of the goods by a fraudulent misrepresentation that he was of full age at the date of the sale. In such circumstances a Court of Equity will not permit an infant to keep the goods without paying their value. An infant shall not take advantage of his own fraud; he is liable to restore any advantage he has obtained by

such representations to the person from whom he has obtained it: *Ex parte Unity Joint Stock Mutual Banking Association, In re King* (1), where a creditor was allowed to prove in bankruptcy in respect of a loan made to the bankrupt when an infant on his fraudulent misrepresentation that he was of full age. That case is recognized in *Ex parte Jones, In re Jones.* (2)

Alternatively, an infant is at law liable for torts: *Bristow* v. *Eastman* (3); *In re Seager, Seeley* v. *Briggs* (4); *Cowern* v. *Nield.* (5) The goods in the present case were obtained by fraud, and the value of them is recoverable as damages in an action of deceit.

In the further alternative, the contract of sale being void by the Infants Relief Act, 1874 (37 & 38 Vict. c. 62), the defendant has no answer to an action of conversion.

Newbolt, for the defendant. Even if these goods were necessaries the property in them never passed to the defendant, because the instrument purporting to pass the property contains a licence to take possession of personal chattels as security for a debt. Therefore it was a bill of sale within s. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31); and, being given by way of security for the payment of money, it is void by s. 9 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), since it is not made in accordance with the form in the schedule to that Act. The subsequent conduct of the plaintiff and her agent precludes the former from complaining of the defendant's dealings with the goods.

But it is clear that the goods were not necessaries: *Ryder* v. *Wombwell.* (6) That being so, the plaintiff has no remedy at law. If an action were brought on the contract the plea of infancy at the date of the acceptance of the goods would be a valid plea; and a replication, even on equitable grounds, that the contract of sale was induced by a fraudulent misrepresentation that the defendant was of full age would be demurrable: *Bartlett* v. *Wells* (7); *De Roo* v. *Foster.* (8)

(1) 3 De G. & J. 63.
(2) (1881) 18 Ch. D. 109.
(3) (1794) 1 Esp. 172.
(4) (1889) 60 L. T. 665.
(5) [1912] 2 K. B. 419.
(6) (1868) L. R. 4 Ex. 32.
(7) (1862) 1 B. & S. 836.
(8) (1862) 12 C. B. (N.S.) 272

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As to the liability of an infant in tort, no doubt an infant is liable for such torts as are independent of contract: *Bristow* v. *Eastman* (1); *Burnard* v. *Haggis* (2); *Cowern* v. *Nield* (3); but to actions founded upon contract infancy is a good plea, although the action is laid in tort: *Johnson* v. *Pie* (4), a case which is indistinguishable from the present; see also *Jennings* v. *Rundall.* (5)

Then as to the alleged remedy in equity, it is a remedy of a very limited application and only available in a case falling within the jurisdiction of the Court of Chancery. An action for the price of goods sold and delivered could never have come into that Court. If a bill had been brought to rescind the contract on the ground of fraud, the Court might order a reconveyance of any property in the hands of the defendant acquired through the transaction: *Lempriere* v. *Lange* (6); but here there is no claim to set aside the sale, and even if there was it would not help the plaintiff, because the defendant has parted with the goods. The equity relied upon is not a remedy which can be enforced directly. The liability does not result in a debt: *Ex parte Jones, In re Jones* (7), where it is only recognized in the process of being avoided. The only principle upon which it can be based is an estoppel: *Wright* v. *Snowe* (8); *Nelson* v. *Stocker.* (9) If that be its true foundation, the alleged equity can no longer be relied on since the decision of the Court of Appeal in *Levene* v. *Brougham.* (10) There is no case to be found in which the Court of Chancery has ordered payment of the value of goods by a defendant who while an infant purchased the goods by means of a fraudulent misrepresentation that he was of full age at the date of the sale. To make such an order would be in effect to make an infant liable on a contract of sale for goods other than necessaries, a liability to which by the law of the land he is not subject.

Farleigh in reply.

Cur. adv. vult.

(1) 1 Esp. 172.
(2) (1863) 14 C. B. (N.S.) 45.
(3) [1912] 2 K. B. 419.
(4) (1665) 1 Sid. 258; 1 Keb. 905, 913.
(5) (1799) 8 T. R. 335.
(6) (1879) 12 Ch. D. 675.
(7) 18 Ch. D. 109.
(8) (1848) 2 De G. & Sm. 321.
(9) (1859) 4 De G. & J. 458.
(10) (1909) 25 Times L. R. 265.

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March 11. LUSH J. read the following judgment:—In this case I left certain questions to the jury, reserving all matters of law which had been raised for further discussion if necessary. The question as to the amount for which a verdict, if given for the plaintiff, should be entered was by consent left to me to decide. It involves questions of law as well as of fact, and I suggested that this course should be taken as I thought that my decision, if it should involve an erroneous view of the law, could the more easily be set right. The jury having answered the questions, and counsel having argued the points of law after the findings had been given, I have now to give my judgment.

The questions that I have to decide are these:—(1.) Whether there was any evidence on which the jury could properly find, as they did, that the goods supplied to the defendant when he was an infant were necessaries; (2.) whether, if not, the plaintiff was entitled to relief in equity; and, if so, (3.) for what amount.

As to (1.) I am of opinion that there was no evidence on which the jury could find that the goods were necessaries. The jury found that they were, because they thought, as they told me, that the defendant was about to be married when he bought them. Assuming that he was, I do not think that the jury were warranted in finding, certainly in these circumstances, that the articles purchased were necessaries for the defendant. A very large number of them consisted of curios and other things which a collector might fancy but which a young man in the defendant's circumstances could not reasonably require. There was a large number, over twenty, of snuff-boxes, a still larger number of candlesticks, weapons from various countries, two gongs, one from Burmah and one from elsewhere, and a large quantity of goods of that character. Such things for a young man with no means, although looking forward to a reversion of about 3000*l.* falling into possession in about twelve months, are in my opinion unjustifiable extravagances, and not in any proper sense necessaries. The burden of proof that they were necessaries was on the plaintiff, and she failed to discharge it. It matters nothing that the list included things that would properly be called necessaries. If it included, as it did, a substantial number of things that were not, the contract, which was one entire contract, would

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not be binding on the defendant. I do not moreover think that there was any evidence to warrant the finding that the defendant was in fact about to be married. He told other persons no doubt that he was, when he made the untrue statement that he was of age. These were his excuses for getting the goods, but there was no other evidence. The actual evidence was that he was not about to be married. I do not think that the jury were warranted in acting on the fact that he had put forward this excuse any more than they would have been warranted in finding that he was possessed of a fortune merely because he had happened to choose that as his pretext. The goods therefore not being necessaries, the plaintiff could not sue on the contract for the price.

The next question, which is the one that has caused me some difficulty, is whether under the peculiar circumstances of this case the plaintiff has a claim for equitable relief, and if so to what amount. That an infant who appears to be of full age, and who has made an express representation that he is of full age fraudulently and to deceive some other person, incurs an equitable liability under some circumstances is clear enough. He cannot be sued for damages although he is generally speaking liable for a tort; the reason being that a temptation would be offered both to the infant himself and to other persons to enter into contracts if the other party were able by obtaining a representation of majority by the infant to make the contract practically effective. For the more complete protection of the infant, the law prevents the other contracting party not only from suing on the contract, but also from suing for damages, if the fraud is connected with and forms the inducement to the contract. Nor is the infant estopped from proving the true facts, which again, if such an estoppel were permitted, would deprive the infant of the protection necessary for his security. What the Court of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages or compensation for the loss of the other party's bargain. If the infant has obtained property by fraud he can be compelled

to restore it; if he has obtained money he can be compelled to refund it. If he has not obtained either, but has only purported to bind himself by an obligation to transfer property or to pay money, neither in a Court of law nor a Court of Equity can he be compelled to make good his promise or to make satisfaction for its breach.

Although the principle thus stated appears to be plain and comprehensive, it is by no means easy to say whether on the facts of this case the plaintiff has a remedy or, if she has, to state precisely what it is. This case raises a question which is not covered by any authority as far as I can find. The facts are these:—

The defendant while an infant obtained furniture under an absolute bill of sale given by the plaintiff by a false and fraudulent representation that he was of full age, and, not being in a position to pay at once, entered into an agreement to pay on a future date and by the same instrument authorized the plaintiff, the grantor, to resume possession of the chattels if he failed to pay.

Mr. Newbolt contended that, as the defendant had given the plaintiff a licence to seize, the bill of sale was void under the Bills of Sale Act, 1882, because a bill of sale by virtue of the Bills of Sale Acts includes a licence to seize, and the Act of 1882 avoids all bills of sale given to secure the payment of money if they are not in the statutory form. I have already held (when the objection was made to the document being relied on) that this contention is unsound and that the bill of sale was not void. There was no assurance of chattels given by the defendant, and no assurance to secure the payment of money. There was only the one assurance, namely by the vendor, the plaintiff, which was not to secure the payment of money, and which therefore was governed by the Act of 1878 and not by the Act of 1882. That bill of sale, the transfer of the chattels to the defendant, could not, I think, be made void on the ground suggested; all that could be avoided would be the licence to seize, and it does not seem to me to be possible to avoid part of the instrument because that part was not in the statutory form.

As I have held that the chattels were not necessaries it would

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not assist the defendant if the bill of sale or any part of it were avoided. The equitable liability depends, not on the validity of the contract, but on the fact that the defendant while an infant obtained goods from the plaintiff by a false and fraudulent representation. Now if the defendant still had the furniture in his possession I should have felt no difficulty in holding that he must restore it, and that, if necessary, the bill of sale should be cancelled. This is in my opinion covered by authority to which I will refer in a moment. But he has not. He has parted with the goods. Some he sold for approximately 30*l.*, the remainder he transferred by a bill of sale (which was to secure the payment of money) to a third person who has sold them. The question I have to decide is whether under those circumstances he is liable in equity to the plaintiff, and, if so, for what amount. To answer these questions I must consider what the precise principle is which underlies this equitable liability, and it is there that I find the difficulty. It is the same difficulty as was pointed out by Knight Bruce V.-C. in *Stikeman* v. *Dawson* (1), who said: "Unquestionably it is the law of England that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense, and for civil purposes, in the view of a Court of Equity, though perhaps only when pubertati proximus or older, and not, I suppose, at so early an age as in a criminal sense, for criminal purposes, and may therefore commit a fraud for which, or the consequences of which, he may after his majority be made civilly answerable in equity. I am not now speaking of cases in which infants, if liable at all, are liable at law only, or in which adults, if suable in respect of acts done during infancy, are suable at law only. But as far as equity is concerned, the practical application of the rule or doctrine to which I have been just referring must not seldom, I conceive, be matter of much delicacy and difficulty. I agree with a learned author (2) who says, that in what cases in particular a Court of Equity will thus exert itself it is not easy to determine." The cases in which the

(1) (1847) 1 De G. & Sm. 90, at p. 109.

(2) Chambers, Jurisdiction of High Court of Chancery over Infants (1842), p. 413.

principle has been applied are (1.) cases where the infant by his fraud has obtained possession of property which he still retained at the time the suit or action was brought, and (2.) cases where the infant has obtained money by the fraud. Thus in *Lempriere* v. *Lange* (1) the Court held that the lease of a furnished house which an infant had obtained by a fraudulent representation as to his age must be cancelled and the property given up. The same principle would, no doubt, apply to the conveyance of a freehold estate. In *Evroy* v. *Nicholas* (2) on the other hand an infant had (as it was apparently held) obtained the payment of a premium for a lease granted by his guardian by a fraudulent misrepresentation as to the guardian's authority to grant it. It is not clear from the report that even this fraud was found as a fact, but in *Stikeman* v. *Dawson* (3) Knight Bruce V.-C. suggested that this may have been what was really decided. See 1 De G. & Sm. 115 and the extract from the registrar's book with the note of *Esron* v. *Nicholas*, ibid. p. 118. The defendant was ordered to refund the amount which had been paid to him. Knight Bruce V.-C. in *Stikeman* v. *Dawson* (3) criticized the judgment on the finding of fact, but that the liability to refund would have been incurred if there had been such a fraud was not apparently questioned. In *Bristow* v. *Eastman* (4) an infant who had embezzled moneys of his employer, the plaintiff, was ordered to repay the amount in an action for money had and received. There, however, the fraud was not connected with a contract. The same remedy was recently held by a Divisional Court to be open to a plaintiff from whom the defendant when an infant had obtained payment for goods part of which he never supplied at all and as to the remainder of which he supplied worthless goods: *Cowern* v. *Nield*. (5) An action ex delicto was, it was held, maintainable under such circumstances. The fraud suggested there was committed, if at all, in the course of carrying out the contract. The Court sent the case back to the county court to have the facts investigated in order to see if there was a fraud. This remedy

(1) 12 Ch. D. 675.
(2) 2 Eq. C. Ab. 488.
(3) 1 De G. & Sm. 90.
(4) 1 Esp. 172.
(5) [1912] 2 K. B. 419.

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being a claim for money had and received and being in substance an equitable one, the two last mentioned decisions are really only instances of the application of a similar principle to that which I have been discussing. In *Ex parte Unity Joint Stock Mutual Banking Association* (1) a person who had lent money to an infant on the faith of a fraudulent representation as to age was held entitled to prove in his bankruptcy. In *Ex parte Jones, In re Jones* (2) the Court of Appeal held that the creditor was not entitled to prove because there was no express representation, but Jessel M.R. (3) recognized the existence of the principle had the facts justified its application. Mr. Newbolt contended that the case of *Levene* v. *Brougham* (4) was against this view, but it seems to me clear that it is not, and indeed the Court recognized the principle but held that there was no ground for its application in that case. It was an action tried in the short cause list under the Rules of the Supreme Court, Order XIV., and, as the plaintiff could only succeed if he proved that there was a debt or liquidated demand, the plea of infancy was held to be an answer to that action. Mr. Newbolt also contended that since the Infants Relief Act, 1874, which avoided all contracts by an infant except for necessaries, the equitable principle was no longer available. Again I think that this involves a confusion between the remedy on the contract and the remedy in equity for the fraud. The fact that the contract is no longer voidable but void affects the liability on the contract, but does not touch the liability which I am discussing. I must refer in passing to another suggestion which was made in the course of the argument, namely, that since that Act an action of detinue or conversion would lie. I thought at the time that there might be some foundation for this suggestion and that, as at common law an infant who when of full age avoided the contract would have divested himself of the property, so now it might be contended that the whole transaction was avoided by the Act and that the property had not passed at all. I am satisfied that that view is wrong and that the property passed by the delivery, notwith-

(1) 3 De G. & J. 63.
(2) 18 Ch. D. 109.
(3) Ibid. at p. 120.
(4) 25 Times L. R. 265.

standing the fraud, and that the plaintiff has a remedy in equity or none at all.

Now I am of opinion that she has a remedy. The jurisdiction which the Court exercises is not only a jurisdiction over the property which the infant has acquired by his fraud, but also over the infant himself to compel him to make satisfaction, as Lord Cowper said in *Watts* v. *Cresswell* (1), for the fraud he has committed. The judgment in *Ex parte Unity Joint Stock Mutual Banking Association* (2) would not otherwise have been as it was, nor would the Master of the Rolls have expressed himself as he did in *Ex parte Jones, In re Jones.* (3) In *Ex parte Unity Joint Stock Mutual Banking Association* (2) the proof was allowed because the infant had incurred a liability to make good the loss or discharge the equitable debt out of his general assets. In my opinion it follows that, if an infant has wrongfully sold the property which he acquired by a fraudulent misrepresentation as to his age, he must at all events account for the proceeds to the party he has defrauded. I can see no logical ground on which he can be allowed to resist such a claim in that case, if he is accountable for the money itself in a case where he has obtained money and not goods by means of a like fraud. It is not necessary for me to decide more than this in the present case because, assuming that an infant, who has wrongfully obtained goods in the way in which this defendant obtained them, and who wrongfully parts with them either as a gift or at an undervalue, must account for their real value, I must hold on the facts of this case that the defendant is only bound to account for what he actually received, for the following reason: Some of the goods, as I have said, he sold for 30*l.*, and I have no evidence to lead me to say that they were sold for too little. As to the remainder he gave a bill of sale over them which was assented to and even arranged by the plaintiff acting through Arthur St. Claire Stocks, her agent. It was, I think, known to all the parties to be very problematical whether the defendant would be able, and in fact he has been unable, to redeem the goods. The advance made by the bill of sale holder

(1) (1714) 9 Vin. Abr. 415.
(2) 3 De G. & J. 63.
(3) 18 Ch. D. 109.

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was of course much less than the value of the goods (the jury found that the value of the whole collection was 300*l.*); but I do not think that under these circumstances the plaintiff ought to be permitted to say that the defendant should account for the actual value or to say that the defendant obtained any other benefit from his fraud than the moneys he actually received. The defendant did not, except as to the 30*l.* worth of goods, wrongfully part with the goods at all; on the contrary, the plaintiff through her agent assented to his putting it out of his power to restore them, and she cannot therefore complain that he is not in a position to do so. There was a dispute as to whether the plaintiff's agent, Arthur St. Claire Stocks received some of the moneys advanced to the defendant by the bill of sale holder. It has been left to me to decide the amount for which the defendant is liable, and I accept, as the jury accepted, the evidence of Arthur St. Claire Stocks in preference to that of the defendant, and find that he did not receive any part of the money as alleged. The defendant received the benefit of the whole of the advance, the plaintiff herself providing part of the money, namely, 50*l.* What the total advance was I am not clear and, if necessary, I must take an account in order to ascertain it, but no doubt the parties will be able to agree the figures. For this sum, to which the 30*l.* for what was sold must be added, I hold the defendant liable, subject, however, to the question which arises on the set-off and counter-claim which I must now deal with.

[The learned judge proceeded to deal with the set-off and counter-claim. This part of the case does not seem to call for a report. It was ultimately ascertained that the sum advanced on security of the goods was 100*l.*, and this was added to the 30*l.* the proceeds of the part sold. A set-off was allowed for 66*l.* 5*s.* 9*d.*, and judgment was ultimately entered for the plaintiff for 63*l.* 14*s.* 3*d.*]

Judgment for plaintiff.

Solicitors for plaintiff: *R. Raphael & Co.*
Solicitor for defendant: *Guy Wallington.*

W. H. G.

METROPOLITAN RAILWAY COMPANY *v.* LONDON COUNTY COUNCIL.

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March 14.

Metropolis—General Line of Building—Erection in Front of—Exemption—Powers conferred on a Railway Company by a Special Act—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 31.

By s. 22 of the London Building Act, 1894, "No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street." And by s. 31 of that Act, "Nothing in this part of this Act" including s. 22 "shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes."

A railway company in 1866 were empowered by a special Act to "enter upon take and use" for the purposes of their railway a certain site adjoining a street in the metropolis. The special Act incorporated the Railways Clauses Act, 1845, by s. 16 of which the company "may erect and construct such . . . . buildings . . . . and other works and conveniences as they think proper" and "may do all . . . . acts necessary for making maintaining . . . . and using the railway." In 1908 the company erected upon the site an accumulator shed which was used for railway purposes in connection with the electrical signalling upon their railway. The shed was in front of the general line of buildings in the street:—

Held, that both the general power to "use" the site for the purposes of the railway given by the special Act and the general powers given by the Railways Clauses Act conferred a statutory power to erect the accumulator shed upon that site within the meaning of s. 31 of the Act of 1894, and that a special power authorizing that particular work was not necessary to entitle the company to build in front of the general building line without the consent of the county council.

Case stated by a metropolitan police magistrate.

The appellants, the Metropolitan Railway Company, were summoned for having erected without the consent in writing of the London County Council a certain structure in front of the general line of buildings in the Euston Road contrary to the provisions of s. 22 of the London Building Act, 1894.

By s. 4 of the Metropolitan Railway (Additional Powers) Act, 1866 (29 & 30 Vict. c. clx.), the appellants were empowered to "enter upon take and use" such of certain lands delineated on the deposited plans and described in the deposited book of reference as they might require "for all or any of the purposes

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of this Act or the Metropolitan Railway Acts." Such lands included the two messuages or tenements known as Nos. 110 and 112, Euston Road, in the parish of St. Pancras. On July 30, 1867, the appellants under the said powers conferred on them by the said Act purchased from Earl Somers inter alia the fee simple of the said two messuages or tenements subject to leases expiring at the end of the year 1882. The conveyance to the appellants was in ordinary form and contained a recital by which it appeared that the said premises (with others) were required by the appellants for the purposes of the said Metropolitan Railway (Additional Powers) Act, 1866. The said messuages are situate in Euston Road, with forecourts in front thereof.

Nothing was placed upon either of the said forecourts until the year 1882. In that year a ventilating shaft or ventilator was opened up from the appellants' railway through the said forecourt and the opening from the ground was enclosed to the height of about six feet.

By s. 9 of the Metropolitan Railway Act, 1898 (61 & 62 Vict. c. clxxvii.), the appellants were empowered to enter upon, take and use (inter alia) the said two messuages or tenements and to make and maintain thereon openings and such other works as they might deem necessary or expedient for the purposes of ventilating their railway and otherwise for the improvement of certain of their stations. On the deposited plans the said forecourts were described as "enclosed ventilator and passage."

By s. 15 of the same Act it was provided that notwithstanding anything contained in that Act or shewn on the deposited plans it should not be lawful for the appellants without the consent of the respondents to erect or maintain any building beyond the general line of building in any street in the county of London other than works for the purpose of ventilation which should be made subject to the provisions of that Act.

By the 25th and following sections of the same Act the appellants were authorized to work by electrical power the traffic on their own and certain other railways.

No alteration was made to the said ventilator under the ventilating powers of such last-mentioned Act or otherwise and

it remained as originally constructed until shortly before the erection of the structure hereinafter referred to, when the ventilator was done away with, the ground being filled in and the walls or shafting removed.

In July, 1908, the appellants erected on the forecourt of Nos. 110 and 112 a structure twenty feet high and eight feet in width consisting of 9-inch brick wall to a height of four feet supporting a wooden structure glazed with glass and with a roof of galvanized iron, the total height to the ridge of the roof being 11 feet 4 inches. The said structure was erected by the appellants and is used by them for an accumulator shed in which are placed accumulators used in connection with the electrical signalling on their said railway. In 1904 the appellants erected on the site of the houses Nos. 110 and 112 a transformer station for reducing an alternating current of high voltage to a direct current of considerably lower voltage. In 1908 the appellants, finding that the signalling on their railway was not sufficiently good, introduced automatic signalling. In order to do this it was necessary to have a special current. This is produced inside the sub-station by two motor generators, but when the current is shut off for three or four hours a day it is necessary to have such accumulators as aforesaid to maintain the working of the signals. The accumulators are a necessary part of the apparatus of the automatic signalling system in use on the said railway, and the magistrate found as a fact that the said accumulators so used are used for railway purposes. Part of the said structure is on the site of the said ventilator.

By his certificate dated December 17, 1908, the superintending architect of metropolitan buildings certified that the main fronts of the buildings formed the general line of buildings on the north side of Euston Road between Ossulston Street and Churchway, in which part of Euston Road Nos. 110 and 112 are situate. The said certificate was confirmed by the tribunal of appeal on February 2, 1912. The structure in question was erected beyond the general line of buildings so defined by the superintending architect and was erected without the consent of the London County Council.

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By the London Building Act, 1894, s. 22, it is provided that no building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street, place, or row in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet.

By s. 31 of the said Act it is provided that nothing in this part of the Act, that is to say Part III., in which is contained s. 22, "shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes."

It was contended on behalf of the appellants that the said structure had been erected by them in the exercise of the powers conferred upon them by the Metropolitan Railway Acts and was therefore exempted by the provisions of s. 31 from the operation of s. 22.

The magistrate was of opinion that the erection of the structure was not done in the exercise of any powers conferred upon the appellants by any Act of Parliament, and that it was consequently not within the protection of s. 31. He accordingly convicted the appellants

Macmorran, K.C., and *Bethune*, for the appellants. The magistrate was wrong in holding that the erection of the shed was not within the protection of s. 31 of the Act of 1894. He has found that it was used for railway purposes; therefore the only question is whether it was erected in the exercise of powers conferred by any special Act. The Metropolitan Railway (Additional Powers) Act, 1866, by s. 4 authorized the company to "take and use" the site upon which the shed is built "for all or any of the purposes of this Act or the Metropolitan Railway Acts," and those purposes included the working of the railway thereby authorized. This shed is necessary for the convenient working of the railway. Its erection is therefore covered by s. 4. It is not necessary in order to bring the accumulator shed within s. 31 that the special Act should have in terms mentioned accumulator sheds. No railway Act in terms mentions the laying of rails; the power to lay rails is

included in the general power to use the land for the purposes of the railway. That general power includes the making and maintaining of anything that is necessary for the purposes of the railway:' *City and South London Ry. Co.* v. *London County Council.* (1) The authority so given by the Act of 1866 to erect this shed is not taken away by s. 15 of the Metropolitan Railway Act, 1898. That Act may be disregarded. The reason why the two houses 110 and 112, Euston Road, which already belonged to the company, were again scheduled in that Act was that complaints had been made of nuisance arising from the use of the ventilating shafts which they had made in 1882, and the company were desirous of making it quite clear that the nuisance, if any, was authorized by statute, and accordingly in s. 9 of that Act they took power to use any of the lands on the deposited plans for the purpose of maintaining openings for ventilating their railway. Then s. 15 was introduced to exclude any possible supposition that the Act empowered the company to build beyond the general building line for any purpose except that of ventilation shafts. It did not purport to cut down any power of building beyond the building line which the company already possessed. Nor indeed would it have been effectual for that purpose if it had, for a private Act cannot by implication repeal a former private Act; to produce that result the later Act must contain express words of repeal: *Trustees of the Birkenhead Docks* v. *Birkenhead Dock Co.* (2)

Daldy, for the respondents. The company did not erect the shed under the powers given by their special Act, but in the exercise of their ordinary rights as landowners, and as landowners they were bound by the restrictions as to the building line. If the general power to "use" the land for any of the purposes of the Metropolitan Railway Acts includes a power to erect any structure the company may think proper for the working of the railway, all the clauses in those Acts which are devoted to specially authorizing particular works would seem to be superfluous.

Macmorran, K.C., in reply. In addition to the power given by s. 4 of the Act of 1866 to use this land for the purposes of the

(1) [1891] 2 Q. B. 513. (2) (1853) 23 L J. (Ch.) 457.

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railway, a further power is given by s. 16 of the Railways Clauses Act, 1845, which is incorporated in the special Act. That section provides that the company "may erect and construct such . . . . buildings . . . . and other works and conveniences as they think proper" and "may do all . . . . acts necessary for making maintaining . . . . and using the railway." Those powers would clearly include the erection of this shed.

CHANNELL J. I am of opinion that this appeal must be allowed. The question turns upon the construction of s. 31 of the London Building Act, 1894. Part III. of that Act relates to the line of building frontage, and the effect of the Act is to take away from the owners of land abutting on highways which have become streets the right to build on what I may call the margin of their land if by so doing they would bring their building in front of the general line. Then at the end of Part III. you find s. 31, which says that "Nothing in this part of this Act shall affect the exercise of any powers conferred upon any railway company by any special Act of Parliament for railway purposes." What does that mean coming in the connection in which it does? It means that if by their special Act (which of course would include the Railways Clauses Act where, as here, the special Act incorporated it) the railway company have got powers at the date of the passing of the London Building Act to build up to the boundary of their land they are to continue to have that power, the general building line notwithstanding. Therefore we have to consider what the position of this railway company was in this respect in 1894. Of course if that position had since that date been altered by subsequent legislation that would be a different matter, but there is nothing to shew that it has. Reference was indeed made to s. 15 of the Metropolitan Railway Act, 1898, but that section does not really touch the question. All that it meant was that, power having been given by another section, s. 9, to build ventilation works on any part of the scheduled lands, that is to say without regard to the building line, the Act is not to be interpreted as giving power to build beyond the building line for any other purpose. But it was not thereby intended to take away any power of building beyond the

building line which the company already possessed. We may therefore leave the Act of 1898 out of consideration. In 1894, then, the company had under their Act of 1866 power to place upon the forecourts of Nos. 110 and 112 in contravention of the building line any structures they pleased provided they were used for railway purposes. No doubt they could not have put shops there, because shops are not used for a railway purpose. But if automatic signalling by electricity had been invented at that date they could have erected on this very site an accumulator shed in connection with their signalling apparatus similar to that which is complained of here. I think that they could have done so under the general words in s. 4 of the Act of 1866 "take and use such of the additional lands . . . . as they may require for all or any of the purposes of this Act or the Metropolitan Railway Acts." But it having been pointed out to us that the Act incorporated the Railways Clauses Act, and our attention having been drawn to the very wide language of that Act, I think the matter is beyond all possibility of doubt. If indeed the magistrate had not found that the accumulator shed was used for railway purposes I do not think that we could have found that it came within s. 31 of the London Building Act, 1894, but as he has found that, the difficulty is removed. I come to the conclusion that, the shed was erected by the company under their statutory powers and not in the mere exercise of their rights as landowners. If the erection had been made in the exercise of those latter rights the railway company would like any other landowners be controlled by the provisions of the London Building Act as to the line of frontage.

BRAY J. I am of the same opinion. The appellants acquired Nos. 110 and 112, Euston Road under the powers conferred upon them by the Act of 1866. Upon the forecourts of those houses they have erected a building which comes beyond the general building line, and which would but for s. 31 contravene the provisions of s. 22 of the London Building Act. Are then the appellants protected by s. 31? The magistrate has found that what was done was for railway purposes, therefore we need not trouble about that. The question which we have to consider is

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whether they did it in the exercise of powers conferred upon them by a special Act of Parliament. They say that they did because s. 4 of the Act of 1866 gave them power to take and use this land for all or any of the purposes of their railway Acts. Moreover the Act of 1866 incorporated the Railways Clauses Act, which empowered them to erect such buildings as they might think proper and do all other acts necessary for maintaining and using the railway. I think that both under s. 4 and also under the incorporated clauses the appellants had power to erect this accumulator shed where they did. Therefore they come within s. 31, and the consent of the county council was unnecessary. I need not say anything with reference to s. 15 of the Act of 1898 except that I entirely agree with my brother Channell's construction of it.

LORD COLERIDGE J. I agree that the Act of 1898 should be eliminated from the consideration of this case as inapplicable. The only question is whether this building was erected under the powers conferred by the special Act of 1866. Sect. 4 empowered the company to use this portion of the forecourts for all or any of the purposes of that Act, and the Act also incorporated s. 16 of the Railways Clauses Act, which gives equally wide powers of user. I think those powers are sufficient to cover the erection of such a building as this. I agree that the appeal must be allowed.

Judgment for appellants.

Solicitor for appellants: *C. de W. Kitcat.*
Solicitor for respondents: *Edward Tanner.*

J. F. C.

METROPOLITAN WATER BOARD *v.* AVERY.

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March 5, 17.

Water—Supply—London—"Domestic Purposes"—Trade Purposes — Public-house—Catering Business—Metropolitan Water Board (Charges) Act, 1907 (7 *Edw.* 7, *c. clxxi.*), *ss.* 8, 25.

By s. 8 of the Metropolitan Water Board (Charges) Act, 1907, the Water Board shall at the request of the occupier of any house or building in any street within the limits of supply in which any service pipe of the Water Board is laid who is entitled to a supply of water for domestic purposes furnish to such occupier a supply for domestic purposes at a rate per cent. upon the rateable value of the house or building. By s. 25 the expression "domestic purposes" shall not include a supply for any of the following purposes (inter alia), "any trade, manufacture, or business."

The defendant was the occupier and licensee of a public-house, within the district of the Metropolitan Water Board, which was supplied with water in the ordinary way by supply pipes from the Water Board's mains. The water so supplied was charged for as a supply for domestic purposes by a rate of 5 per cent. upon the rateable value of the house. The defendant carried on in the house, in addition to the ordinary business of a public-house, a catering business for persons who came there to lunch but who did not reside there. Luncheons were served there every day, which involved an increased use of water for such purposes as cooking and washing up plates and dishes. The Water Board claimed to be entitled to make a small extra charge for the water so used, in addition to the charge of 5 per cent. upon the rateable value of the house, upon the ground that the water was used for other than "domestic purposes":—

Held, that, as the use of the water was in its nature domestic, the supply was for "domestic purposes" within the meaning of s. 25, and the fact that the use of the water was ancillary to the catering business carried on in the house or that the existence of the business necessitated an increased supply for domestic purposes did not make it a supply for the purposes of the business; and that therefore the Water Board were not entitled to make the extra charge.

Appeal from Westminster County Court.

The action was brought to recover 5*s.*, being the amount of two quarters' water rate for a supply of water to a house, No. 1, John Street, for, as alleged by the plaintiffs, non-domestic purposes.

The defendant was the occupier and licensee of a public-house, No. 1, John Street, within the metropolitan area, which was

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supplied with water in the ordinary way by supply pipes from the plaintiffs', the Metropolitan Water Board's, mains. The water so supplied was charged for under s. 8 of the Metropolitan Water Board (Charges) Act, 1907, as a supply for domestic purposes by a rate of 5 per cent. upon the rateable value of the whole of the premises. (1) The defendant carried on in the house, in addition to the ordinary business of a public-house, a catering business for persons who came there to lunch but who did not reside in the house. Tables were provided for the purpose, and between twenty and thirty luncheons were served there every day, involving an increased use of water, beyond what would be used in an ordinary public-house, for cooking, washing dishes, plates, &c., and scrubbing floors. The plaintiffs made a charge of 2*s.* 6*d.* a quarter for the water so used (in addition to the charge of 5 per cent. upon the rateable value of the house upon the ground that the water was used for other than "domestic purposes." The defendant refused to pay this

(1) By s. 8 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), the Water Board shall at the request of the owner or occupier of any house or building in any street within the limits of supply in which any service main or service pipe of the Board shall be laid furnish to such owner or occupier by means of a communication pipe and other necessary and proper apparatus to be provided and laid down and maintained by him and at his cost a sufficient supply of water for domestic purposes at a rate per annum which shall not exceed 5 per centum of the rateable value of the house or building in respect of which the supply is required.

Sect. 25: "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water-closets and baths constructed or fitted so as not to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons, but shall not include a supply of water for any of the following purposes (namely):—Steam gas motor and other like engines; railway purposes; ventilating purposes; working any machine or apparatus; consumption by or washing of horses or cattle; washing carriages or other vehicles; watering gardens by means of any outside tap or any hose tube pipe sprinkler or other like apparatus; fountains or any ornamental purpose; cleansing sewers and drains; cleansing and watering streets or roads; fire extinction; flushing drains by means of any apparatus discharging automatically; public pumps baths or washhouses; any trade manufacture or business; any bath constructed or fitted so as to be capable of containing when filled or filled up to the overflow or waste pipe (if any) more than eighty gallons."

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charge. The present action was thereupon brought in the county court to recover two quarters' rate. The county court judge came to the conclusion that the water was used for the purposes of the defendant's trade as a caterer, and not for domestic purposes, and that the plaintiffs were entitled to be paid a reasonable sum for it under s. 18 of the Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93). He accordingly gave judgment for the plaintiffs for the amount claimed.

The defendant appealed.

Ryde, K.C., and *Konstam*, for the defendant. The use of the water for which the plaintiffs seek to charge a rate of 2*s.* 6*d.* a quarter is a use for domestic purposes, and not for trade or business purposes. The nature of the user of the water in the present case, namely, for cooking and washing up dishes and plates, was essentially domestic, such as in an ordinary dwelling-house would be a domestic user, and the authorities shew that, though a trade or business is carried on in the house which necessitates an increased user of water, if the user of the water is in its nature domestic, the user is for domestic purposes. The fact that the water is also used for a trade, manufacture, or business does not prevent it from being used for domestic purposes. The nature of the user must be looked at. The cases of *Vestry of St. Martin's* v. *Gordon* (1) and *Westminster Corporation* v. *Gordon Hotels, Ld.* (2), which relate to the removal of refuse from a hotel, where the business of hotel-keeping is carried on, shew that the words "refuse of any trade, manufacture, or business" refer to the nature of the refuse. Those words, as Lopes L.J. said in the former case (3), mean "refuse which is the immediate and direct result of the trade, manufacture, or business; not a kind of refuse which would arise as much if there was no trade, manufacture, or business, and is only increased in quantity by reason of the trade, manufacture, or business." In *Lyons & Co.* v. *London Corporation* (4) the same principle was applied to the refuse of a restaurant, in which no one resided, and it was held that the refuse was house refuse and not refuse

(1) [1891] 1 Q. B. 61.
(2) [1906] 2 K. B. 39.
(3) [1891] 1 Q. B. at p. 70.
(4) [1909] 2 K. B. 588.

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of a trade, manufacture, or business. Coming to the cases which deal with the supply of water for domestic purposes, the statute in each case containing similar words to those under discussion in this case, it was held in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1) that water supplied to a dwelling-house where the business of a boarding-house was carried on was water supplied for "domestic purposes" and not for a "trade, manufacture, or business," the water being used for purposes which were clearly domestic. So too the occupier of a school erected and maintained for the education of children from a workhouse was held to be entitled to a supply for "domestic purposes": *South-West Suburban Water Co.* v. *St. Marylebone Union* (2), where Buckley J. said (3) that "it is the character of the purpose, not the character of the premises in which the water is used, that is here the important factor. The test of residence is not a test for the purposes of user." The same principle was applied to an ordinary boarding school: *Frederick* v. *Bognor Water Co.* (4); and in *South Suburban Gas Co.* v. *Metropolitan Water Board* (5), a case decided under the Metropolitan Water Board (Charges) Act, 1907, it was held that a supply of water for lavatory and other sanitary conveniences at gasworks was a supply for "domestic purposes," and not for a "trade, manufacture, or business," the nature of the user being domestic. Again, in *Metropolitan Water Board* v. *Colley's Patents, Ld.* (6) water supplied to a factory and used for drinking and washing purposes by the workpeople and for cleansing urinals and water closets used by them was held to be supplied for "domestic purposes." Farwell L.J. said (7) that "the old test remains applicable, namely, that the use to which the water is put, not the nature of the premises, must be considered"; and Kennedy L.J. said (8) that "the question whether purposes are or are not 'domestic purposes' is to be decided . . . . by reference to the purposes in themselves, and not by reference either to the

(1) [1902] 1 K. B. 310.
(2) [1904] 2 K. B. 174.
(3) Ibid. at p. 179.
(4) [1909] 1 Ch. 149.
(5) [1909] 2 Ch. 666.
(6) [1911] 2 K. B. 38; [1912] A. C. 24.
(7) [1911] 2 K. B. at p. 65.
(8) Ibid. at p. 66.

character of the premises where the water is used, or that of the persons using it. Essentially, you have got to find out what a domestic purpose is by the nature of the user." The water was used here for domestic purposes, and the plaintiffs were not entitled to make any charge for it beyond the 5 per cent. upon the rateable value of the public-house. This is reasonable because the room used as a restaurant has a higher rateable value than if it were not so used, and the increased use of water is paid for by the charge upon the higher rateable value. The judgment of the county court judge was therefore wrong. (1)

Clavell Salter, K.C., and *Goodland*, for the plaintiffs. It is largely a question of fact in each case whether the water is used for "domestic purposes" within the meaning of that expression as used in s. 25 of the Metropolitan Water Board (Charges) Act, 1907. The county court judge has found in this case that a restaurant business was carried on in the house and that the water was used for the defendant's trade as a restaurant keeper and not for domestic purposes, and therefore, unless he has misdirected himself, this Court will not interfere with his finding. The question therefore is whether the water supplied for the restaurant was as a matter of law supplied for domestic purposes. The water was used for the purposes of the defendant's business as a caterer, and therefore comes within the words of s. 25 as being a supply for the purposes of a trade or business. The use to which the water is put, such as cooking and washing up dishes, may be a domestic use, but it cannot be that merely because water is so used it must therefore be paid for as a supply for

(1) The further question was argued whether, even if the supply of water was for non-domestic purposes, s. 18 of the Waterworks Clauses Act, 1863, was incorporated in the New River Company's Acts, the New River Company being the authority for the supply of water in the district in which the public-house in question was situate before the undertaking of the company was, with the undertakings of the other metropolitan water companies, transferred to the plaintiffs by the Metropolis Water Act, 1902 (2 Edw. 7, c. 41); and further whether, even if it were incorporated, the plaintiffs had any right to recover the charge under s. 18 of the Waterworks Clauses Act, 1863, or at all. Inasmuch, however, as the Court expressed no opinion upon either of these points, it is considered unnecessary to set out the arguments.

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domestic purposes. There must be some limitation. This is clear from the judgment in *Barnard Castle Urban Council* v. *Wilson*. (1) For instance, water supplied to a laundry is not a supply for domestic purposes, though the use of the water may be in its nature domestic. According to the decision in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2) a supply of water for domestic purposes means a supply for the domestic purposes of the persons residing in the house, whether belonging to the family of the occupier, or his guests or boarders. As Channell J. pointed out in that case (3), the payment for water supplied for domestic purposes is regulated by the annual value of the house, and the larger the number of inmates, and therefore presumably the larger the house, the greater will be the payment based upon its annual value. That decision does not cover the case of a user of water in a restaurant for persons who are not resident in the house and who only come there to have their meals. To make the purpose a domestic purpose two things must exist. There must be (1.) a domestic use of the water, and (2.) that domestic use must be by or for the inmates of the house, except of course in the case of an ordinary guest who is invited to a meal in the house. In *Barnard Castle Urban Council* v. *Wilson* (1) the test applied was whether the water was used for increasing the amenities of the house as a house where persons resided. Romer L.J. said (4) that "in my judgment the bath"—a swimming bath at a school—" was really constructed and is required for the purposes of the business of the school, and not for the domestic purposes of the school considered as the domus or home of the boys"; and Stirling L.J. said (5): "For myself I am not prepared to say that, if the occupier of a house constructed a swimming bath for the use of himself and his household, a supply of water to it would not be for domestic purposes." That case lays down the same rule as was laid down in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (2), namely, that to be a supply for domestic purposes the supply must be for the use of the inmates of the house. As laid down by the House of Lords in *Colley's*

(1) [1902] 2 Ch. 746.
(2) [1902] 1 K. B. 310.
(3) Ibid. at p. 315.
(4) [1902] 2 Ch. at p. 757.
(5) Ibid. at p. 758.

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Patents, Ld. v. *Metropolitan Water Board* (1), the question is whether the water is used for the purpose of the trade or business, that is to say, for use in the trade or business. The water here was used in the defendant's business as caterer and for that business, and therefore it was not used for domestic purposes. The county court judge has found that the water was used for the purposes of the business, and he applied the right rule of law.

With regard to the case of *Frederick* v. *Bognor Water Co.* (2), there the school was a dwelling-house and the water was supplied for the domestic purposes of the inmates. The water was not supplied or used for a trade or business. Moreover, the words of the Act there under discussion differed from those in the present case.

The cases relating to house refuse are not in point, as they are decisions upon other Acts containing different language and dealing with a different subject-matter.

The supply here was for a trade or business and for the use of persons who were not inmates of the house. The supply was therefore not for domestic purposes.

Ryde, K.C., in reply. In some of the cases which have been referred to the water was used by persons not living on the premises, and yet the supply was held to be for domestic purposes.

Cur. adv. vult.

March 17. The following judgments were read :—

BRAY J. My brother Channell has asked me to read my judgment first, as the facts are stated in it. This is an appeal from the Westminster County Court. The claim of the plaintiffs, the Metropolitan Water Board, was stated to be for two quarters' water rate, namely, 5*s.*, which was claimed to be payable in addition to the ordinary rate on the ground that some of the water supplied was used for other than domestic purposes. The facts as found by the county court judge were as follows: The defendant was the occupier and licensee of a public-house which was supplied with water in the ordinary way by supply pipes from the Water Board's mains. The water was charged for

(1) [1912] A. C. 24. (2) [1909] 1 Ch. 149.

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under s. 8 of the Metropolitan Water Board (Charges) Act, 1907, as a supply for domestic purposes by a rate of 5 per cent. on the rateable value of the whole of the premises. The defendant carried on, in addition to the ordinary business of a public-house, a catering business. Tables were provided for people to come there to lunch, and some twenty to thirty lunches were served there every day, which involved an increased use of water beyond what would be used in an ordinary public-house, presumably in cooking, washing plates, &c., and scrubbing floors. On these facts the county court judge held that the plaintiffs were entitled to recover under s. 18 of the Waterworks Clauses Act, 1863.

Two questions were raised in the appeal—first, whether the water was used for "domestic purposes"; second, whether, if it was not, the Board could recover the value of the water so used by a proceeding in the county court. The first is the most important question, and a decision on this point will manifestly govern a large number of cases. The question turns upon the true construction of s. 25 of the Metropolitan Water Board (Charges) Act, 1907, which provides, so far as material, that "In and for the purposes of this Act the expression 'domestic purposes' shall be deemed to include water-closets and baths . . . . but shall not include a supply of water for any of the following purposes (namely):—. . . . any trade manufacture or business." There have been several decisions upon the meaning of the words "domestic purposes" in this and similar Acts of Parliament, and the question cannot be determined without a careful examination of these cases, and endeavouring to ascertain the principle on which they have been decided. I have carefully examined these cases, and I have come to the same conclusion as Kennedy L.J. in the case of *Metropolitan Water Board* v. *Colley's Patents, Ld.* (1) He says (at p. 66): "I think there are some things in this case which are fairly clear. One is that, according to the views of judges now extending over many years, certainly over nine years, the question whether purposes are or are not 'domestic purposes' is to be decided, as I think the language of the Act also indicates in the sections to which Farwell L.J. has referred, by reference to the purposes in themselves, and not by reference

(1) [1911] 2 K. B. 38.

either to the character of the premises where the water is used, or that of the persons using it. Essentially, you have got to find out what a domestic purpose is by the nature of the user." Farwell L.J. says (at p. 65): "I think that the old test remains applicable, namely, that the use to which the water is put, not the nature of the premises, must be considered." Now the use to which the water is put here is, in my opinion, essentially a domestic use. A kitchen and a dining-room are ordinary parts of a domestic establishment. Cooking and cleaning are ordinary processes used in domestic establishments. The use of the water here differs not in the slightest degree in kind from the use to which water is put in the ordinary domestic establishment. The use of water is necessary in cooking, in making tea or coffee, in cleaning plates, in scrubbing floors, in cleaning windows. The contention is that, although it is a domestic purpose if used in preparing a meal for the owner of a boarding-house, or his family, or his servants, or his guests, or his boarders, or (it seems to follow) in the case of a hotel the persons residing in the hotel, it is not a domestic use if it is for the person who merely comes in for lunch for which he pays. The very same water may have been used in cooking a dish or washing plates for the inmate of the hotel and for a non-inmate, for a chauffeur who sleeps in a hotel and for a chauffeur who does not; yet it is said in the one case it is used for domestic purposes, in the other case it is not, although in both the object was to increase the profits of the business. Did the statute intend to make this distinction? I cannot think so. It is true that in *Pidgeon* v. *Great Yarmouth Waterworks Co.* (1) the Court, not wishing to decide more than was necessary for the particular case before them, confined their decision to water used for inmates. But that that was not a logical distinction was shewn by the decision in *Metropolitan Water Board* v. *Colley's Patents, Ld.* (2) I can find no principle on which all the cases can rest except that one must look at the nature of the use of the water. If the water is used for a purpose which is common to all ordinary domestic establishments, it is none the less used for domestic purposes because it is ancillary to a trade, manufacture,

(1) [1902] 1 K. B. 310. (2) [1911] 2 K. B. 38; [1912] A. C. 24.

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or business. It is legitimate to see what would be the consequences of a decision here in favour of the Metropolitan Water Board. Their claim is to charge for water used for the purposes mentioned in addition to the ordinary water rate. Presumably the charge must be, in the absence of any agreement, by measure and a meter. If separate supply pipes are not provided, how is one to measure how much water is used for the lunches and how much for the admittedly domestic purposes? May the consumer use the same water for a common purpose without being bound to pay extra for it? If there are two separate supplies to the kitchen and scullery, is the cook or scullerymaid to find out whether the meal is for an inmate or a non-inmate, and whether the plates to be washed have been used by an inmate or a non-inmate? Again, is it reasonable that an extra charge should be made for it? The fact that a public-house has a large room which can be used as a restaurant gives additional value to it, because an additional profit can be earned The rateable value and therefore the water rate are higher. The rate, which it must be remembered is a rate for water used for domestic purposes, is higher because it is presumed more water will be used for domestic purposes. Yet the occupier must not only pay the additional rate, but must also pay for the extra water used even though it is used for what is essentially a domestic purpose. One can understand a construction of this section which laid down that all water which is used for the purpose of a business, whether in a boarding-house or hotel or factory, is excluded by the terms of the section from being treated as for a domestic purpose, because it is used for the purposes of a business; but this is not the interpretation which has been put on the section. The only alternative seems to be a construction which makes it practically necessary to decide whether the nature of the user is substantially domestic or business. The section contemplated that in the same building there might be a supply for domestic purposes and a supply for business purposes, but it was not, in my opinion, intended that what is essentially a supply for a domestic purpose should be charged for as a supply for a business purpose, merely because the use of the water was ancillary to the business, or because the

existence of the business necessitated an increase of the supply for domestic purposes.

There are plenty of businesses to which the section would apply, such as brewing, paper making, dyeing, mineral water making, &c. Between such business purposes and domestic purposes a clear line can be drawn. I think the reason for the construction which has been put on the section is that for years this clear distinction has been drawn. People have not had to pay extra for water used in this way, and the Courts have been reluctant to hold that because there has been a new definition of domestic purposes the Legislature intended to make an important and radical change. The conclusion I have come to is that the water here was used for domestic purposes within the meaning of s. 25 and not for trade, manufacture, or business purposes, and therefore that the appeal must be allowed on this ground. This makes it unnecessary for me to consider the second point on which I do not desire to express any opinion.

CHANNELL J. I have read the judgment prepared by my brother Bray, and I agree with the result of it and with his reasons, but I wish to add a few words principally on the question whether water which is supplied "for a trade or business" is excluded, as Mr. Clavell Salter contends it is, by the very words of s. 25 of the Metropolitan Water Board (Charges) Act, 1907, from domestic purposes. I think that s. 25 is intended to deal expressly with cases which might be thought ambiguous. Water closets and baths, as to which formerly there had been some doubts, are put by it expressly into domestic purposes, but steam engines and the other things enumerated after steam engines in the section, including supply "for any trade, manufacture, or business," are, I think, expressly excluded from domestic purposes. When, however, one comes to consider the words supply "for any trade, manufacture, or business," the question arises what is the proper meaning to be put on the word "for"; and though I think Mr. Clavell Salter is right in saying that if one finds that the supply is really "for" any trade or business, it is by the very terms of the section excluded from domestic purposes, I think that the decided cases have shewn that the word "for" is not to be considered as having

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in the statute the meaning for which he contends. It is not "for" the business merely because, if there were no business, the supply, or so extensive a supply, would not be wanted. The cases clearly shew that where a business is carried on which has the effect of increasing the number of inmates of the house in the sense of increasing the number of persons dwelling in the house, the supply of water for the domestic wants of those inmates is not a supply "for" the business which causes those inmates to be there. This is shewn by the cases as to schools, boarding-houses, and workhouses. But the decisions go further and shew also that the supply in the house of the domestic wants of persons not dwelling in the house, but only brought there during the daytime because trade is carried on there at which they work, is not a supply "for" that trade, although of course it would not be required, or at all events so large a quantity of water would not be required, but for the fact that the trade was carried on there. That is the case of *Metropolitan Water Board* v. *Colley's Patents, Ld.* (1), in the Court of Appeal and the House of Lords. I think the cases as to house refuse and trade refuse do afford a useful analogy. In the case of a hotel refuse domestic in its character, as ashes and broken victuals, is house refuse, and not trade refuse, although it would not exist, or would not exist in such quantities, but for the business of a hotel being carried on. It is only trade refuse if the trade directly makes the refuse, and not if the trade only increases the quantity of the household or domestic refuse. So I think a supply of water is not a supply "for" a trade or business unless it is supplied to be used actually and directly in the trade. It is trade use of water, and not increase caused by trade of domestic use of water, which is put by s. 25 outside of domestic purposes. I think the authorities all shew this, particularly perhaps the judgment of Kennedy L.J. in *Metropolitan Water Board* v. *Colley's Patents, Ld.* (2) in the Court of Appeal, which was approved in the House of Lords. To be a trade supply the water must be, as it were, the raw material of the trade, as in the case of a mineral water manufacturer who actually sells the water after having treated it and made it into soda water or other mineral water, or it must be the stock in trade

(1) [1911] 2 K. B. 38; [1912] A. C. 24. (2) [1911] 2 K. B. 38.

of the business, if there be such a case, possibly the case of a bath proprietor may be one, or it must be an implement or instrument used in the business, as water for a steam engine (which case, however, is expressly provided for), or for hydraulic machinery, or probably for a laundry or for a dyer's and cleaner's business. There is in such cases a direct use of the water for trade purposes, and the trade is not merely the causa sine qua non, but the direct cause of the water supply.

The case before us is one of the only class of cases which after the decisions already given by the Courts is still left in some doubt, and that is the class of case where the only trade carried on is the supplying to customers for profit what may be called the domestic requirements of the customers. The feeding of customers in a restaurant involves the use of water for cooking, washing, and otherwise, all of which uses are, however, in themselves domestic uses. In the present case, in addition to an ordinary public-house business for which it is agreed that the supply must be assumed to be for domestic purposes, although I suppose the customers there do sometimes drink water with their spirits, if not alone, there is carried on a luncheon business, some thirty luncheons per day being supplied on the average, and in the course of that business water is used for washing plates and dishes, possibly for cooking, and possibly to some extent for drinking. The quantity of water used in the house is therefore increased by this business being carried on, but that in itself is not enough. Is this use "for the business" so as to be excluded from domestic purposes? The character of the use is absolutely domestic. My brother Bray in his judgment has pointed out the difficulty, not to say the impossibility, of dividing the domestic supply from the supposed trade supply. If and so far as the water here can be considered to be used for the trade, it is quite subordinate to the domestic use for the house and cannot be separated from it. Probably it would be right to look at the supply as a whole, and say whether it was substantially a trade supply or substantially a domestic supply. If so, I think that here it is substantially a domestic supply. I can conceive some cases, such as a bath-house, where the proprietor supplies hot and cold baths to his customers for

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payment and thereby uses a large quantity of water, and also uses a smaller quantity for the domestic wants of himself and his household. There the supply might be considered substantially a trade supply. I do not wish, however, to deal too much with cases other than that before us. As to this case, I think the supply stands on the same footing as that in *Metropolitan Water Board* v. *Colley's Patents, Ld.* (1) It is merely an increase by reason of the trade in the quantity wanted for domestic purposes, and cannot be dealt with as being "for the trade" in the sense in which that phrase has been interpreted. I think therefore that the point of substance in this appeal must be decided for the appellant, and it is therefore unnecessary to deal with the other points.

Appeal allowed.

Solicitor for plaintiffs: *Walter Moon.*
Solicitors for defendant: *Maitlands, Peckham & Co.*

(1) [1911] 2 K. B. 38; [1912] A. C. 24.

W. F. B.

[COURT OF CRIMINAL APPEAL.]

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Criminal Law—Evidence—Carnal Knowledge of Girl above Thirteen and under Sixteen Years of Age—Statement by Counsel for Prosecution and Evidence given by Prosecutrix that Prisoner seduced her—Relevancy—Cross-examination of Prosecutrix as to Acts of Connection with other Men—Denial by Prosecutrix—Evidence to prove the Previous Acts of Connection—Evidence of General Bad Character of Prosecutrix—Admissibility—Criminal Law Amendment Act, 1885 (48 & 49 *Vict.* c. 69), *s.* 5, *sub-s.* 1.

By s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885, any person who "unlawfully and carnally knows . . . . any girl being of or above the age of thirteen years and under the age of sixteen years" shall be guilty of a misdemeanour.

At the trial of a prisoner for an offence under the sub-section counsel for the prosecution stated in his opening speech that the prisoner upon the occasion when he committed the offence had seduced the girl, and in her examination-in-chief she gave evidence to that effect. No objection to the opening statement of counsel for the prosecution or to the questions put by him to the girl in her examination-in-chief was taken by counsel for the prisoner. She was cross-examined by counsel for the prisoner as to whether she had previously had connection with other men whose names were mentioned and also as to whether she was a loose and abandoned girl. She answered these questions in the negative. Counsel for the prisoner tendered evidence to prove the previous specific acts of connection by the prosecutrix and to shew generally that she was of bad and light character and therefore not to be believed. The judge rejected this evidence as going to credit only. The jury convicted the prisoner. Upon an appeal by the prisoner against his conviction:—

Held, that the judge at the trial had rightly rejected the evidence inasmuch as the allegation that the prisoner had seduced the girl was not relevant to the issue, and therefore no evidence could be given to contradict it. Nor could the evidence be given for the purpose of contradicting the witness in order to shew that she was unworthy of belief, as the rule that the answers of a witness to questions put in cross-examination which merely go to credit cannot be contradicted applied.

Held, further, that the fact that the allegation had been introduced by the prosecution did not make it relevant to the issue.

Semble that the expression "general status of the witness" used by Alderson B. in giving judgment in *Attorney-General* v. *Hitchcock* (1847) 1 Ex. 91, refers to the competency of the witness.

Appeal by the prisoner Edward Buckton Cargill against his conviction.

The prisoner was tried on February 26 and 27, 1913, at the

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York Winter Assizes upon an indictment charging him under s. 5, sub-s. 1, of the Criminal Law Amendment Act, 1885, with the misdemeanour of having unlawful carnal knowledge of Ada Forsey, a girl above the age of thirteen years and under the age of sixteen years. The prisoner was convicted and sentenced to nine months' imprisonment with hard labour.

It appeared from the evidence given at the trial that the prisoner was a prominent inhabitant of Hull, holding various public positions. On the afternoon of a day in October, 1912, he met Forsey, the prosecutrix, who was between fifteen and sixteen, and two other girls in the street, and went with them into a room in a certain house. The prosecutrix and one of the other girls remained in the room with the prisoner, the second girl only remaining in the house for a short time, and it was alleged by the prosecutrix (who was corroborated by the girl who remained) that the prisoner in the presence of that girl had connection with the prosecutrix. The prisoner denied that he had connection with the prosecutrix, and he also denied that the second girl remained in the room. Counsel for the Crown, in opening the case, told the jury, and the prosecutrix swore in her examination-in-chief, that she had been seduced on that occasion by the prisoner. No objection to the opening statement of counsel for the prosecution or to the questions put by him to the girl in her examination-in-chief was taken by counsel for the prisoner. She was cross-examined by counsel for the prisoner as to whether she had not previously had connection with other men whose names were mentioned and also as to whether she was a loose and abandoned girl. She answered these questions in the negative. Counsel for the prisoner tendered evidence to prove the previous specific acts of connection by the prosecutrix and to shew generally that she was of bad and light character and therefore not to be believed. Rowlatt J. rejected the evidence as going to credit only. The jury convicted the prisoner.

The prisoner appealed upon the grounds (inter alia) (*a*) that "counsel for the prosecution having opened to the jury that Ada Forsey was prior to the alleged offence a virgin and was for the first time seduced by the defendant and having called evidence in support of this allegation the judge was wrong in

rejecting the evidence of witnesses tendered on behalf of the defendant to prove that they during a period of more than two years past had been having connection with her or seen her in the act of having connection with other men."

(*b*) Alternatively that "there was a mistrial in that it was opened to the jury and evidence given to the effect that Ada Forsey was a pure girl until the alleged offence and was seduced by the defendant."

(*c*) That "the judge improperly rejected evidence of general bad character as to . . . . Ada Forsey . . . . and that . . . . she . . . . could not be believed upon her oath."

Sir E. Carson, K.C., Kemp, K.C., and *H. S. Cautley*, for the appellant. The statement at the trial by counsel for the prosecution in his opening speech and the evidence of the prosecutrix herself that the appellant seduced her were matters of grave import and most serious prejudice with the jury. The allegation also affected the status of the prosecutrix as a witness. Although the virginity of the prosecutrix was not a fact material to the question whether the appellant had committed the offence with which he was charged, yet having regard to the fact that the girl's character was set up by the prosecution, the appellant, on every principle of justice, ought to be allowed to call evidence to shew that she was not of good character. If the prosecution is allowed to give evidence of good character the prisoner ought to be allowed to give evidence to contradict it. The moment the status of a witness is set up by the prosecution the prisoner is entitled to give evidence to prove that the witness's evidence is untrue. If affirmative evidence is put forward as to the status of a witness the other side may give evidence contradicting the evidence which has been given as to the status of the witness. Pollock C.B. in *Attorney-General* v. *Hitchcock* (1) said: "The test whether the matter is collateral or not is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence—if it have such a connection with the issue, that you would be allowed to give it in evidence—then it is a matter on which you may contradict

(1) 1 Ex. 91, at p. 99.

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him." The prosecution having given the evidence, it must be taken that it was given because it was material. The prosecution cannot afterwards say that it is collateral to the issue and therefore cannot be contradicted. They cannot be heard to say it is irrelevant: *Thomas* v. *David*. (1) The moment the prosecution made the virginity and character of the witness an issue in the case it became relevant. The principle is that one side having set up the status of the witness as an issue in the case the other side may give evidence in contradiction so that the jury may not be under a false impression. All the exceptions as to the inadmissibility of evidence as to credit are based upon the ground that the jury must not be misled as to the status of the witness. Too narrow a construction ought not to be placed upon the expression "relevant to the issue." On the authority of *Reg.* v. *Brown* (2) this evidence was admissible as being that of persons proving that the general reputation of the prosecutrix was such that they would not believe her on her oath. [*Bamfield* v. *Massey* (3) was also referred to.]

Tindal Atkinson, K.C., and *G. F. Mortimer*, for the prosecution, were not called upon.

The judgment of the COURT (Channell, Bray, and Lord Coleridge JJ.) was delivered by

CHANNELL J. The Court is of opinion that there is no ground for allowing the appeal. The main and the only substantial point is as to the rejection of this evidence on behalf of the appellant. Sir Edward Carson does not contest the general rule that matters which only go to credit and which are deemed to be relevant solely because they go to the credibility of the witness cannot be contradicted by further evidence. That, beyond all doubt, is the general rule, and the learned judge who tried the case acted upon the rule and applied it. But it was suggested on behalf of the appellant that there are exceptions to that rule, and no doubt there are decisions not easy to reconcile with it. But it does not appear in any one of those authorities that it was the intention of the Court to create an exception to the rule. The

(1) (1836) 7 C. & P. 350. (2) (1867) L. R. 1 C. C. R. 70.
(3) (1808) 1 Camp. 460.

inference is therefore that for some reason the Court in the particular circumstances of each case thought that the evidence in question had a bearing on the case beyond the mere question of credibility.

On the appellant's behalf it has been contended that one exception to the rule is where the evidence in question affects the status of a witness. Speaking for myself I am not sure that I understand that contention. There is only one place, so far as I know, where the word "status" is used in such a way as to support this contention, and that is in the report of *Attorney-General* v. *Hitchcock* (1) in the judgment of Alderson B. The first observation to be made as to that case is that the evidence it was desired to call was rejected, so that anything that may have been said in that case in favour of the contention is a mere dictum. Alderson B., in referring to *Thomas* v. *David* (2) (the case which of all those in which this question arose gives rise to the greatest difficulty), said: "So, in the case before my brother Coleridge, in which the woman who was called as a witness for the plaintiff was asked whether she was not living with the plaintiff as his mistress. The tendency of the question was to shew that she stood in that peculiar relation to the plaintiff which the jury ought to know, in order that they might judge to what extent they could rely on the general character of her testimony as an impartial witness between the plaintiff and the defendant. The question had a bearing on the general status of the witness."

It is not easy to understand the meaning of that passage. At that time the law of evidence had recently been altered (3) and the judges would probably have in their minds the old rules of evidence, and I think that they may have been referring to the rules as to evidence and to the fact that a wife was not an admissible witness so that, when a woman swore that she was not the wife, evidence was admissible to prove that she was, and was therefore not a competent witness. In some such sense the evidence might be said to relate to status. Whether or not that is the explanation it is very difficult to say, but in

(1) 1 Ex. 91, at pp. 102, 103. (2) 7 C. & P. 350.
(3) Evidence Act, 1843 (6 & 7 Vict. c. 85).

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any event it was only a dictum. There is no indication in any one of the cases of any intention to introduce an exception to the rule; the intention was merely to bring the facts of the particular case within the recognized rule.

It was further contended that evidence was admissible to prove that this girl was not a virgin, because counsel for the Crown had stated in opening that the appellant had seduced her, and had asked questions of the prosecutrix in examination-in-chief to prove it. The Court is of opinion that the evidence is not admissible because it is not relevant. The questions might have been objected to. It is very common for counsel to state matters which, though not relevant to the issue, are matters of aggravation that may affect punishment. And it is often very good policy for counsel for the defence to make no objection, but to acquire a grievance in consequence of the introduction of the irrelevant matter, but it is impossible to hold that because the prosecution introduced a matter irrelevant to the issue the defence is therefore entitled to call evidence with regard to that irrelevant issue, and that the fact that counsel for the defence chooses not to object to irrelevant evidence gives the defence a right to call further evidence with regard to the matter.

Appeal dismissed.

Solicitor for the prosecution: *Williamson, Hull.*

Solicitors for appellant: *C. J. Smith & Hudson, for A. M. Jackson & Co., Hull.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1913
April 2.

BUCKLEY & BEACH *v.* NATIONAL ELECTRIC THEATRES, LIMITED.

[1913 B. 159.]

Practice—Order of Master remitting Action of Contract to County Court—Original Writ and Order lodged with Registrar of County Court—Subsequent Extension of Time for appealing against Master's Order by Judge at Chambers—Reversal of Order by Judge—Absence of Jurisdiction in High Court after Remittal of Action to County Court—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

Where an action in the High Court has been remitted to the county court under the County Courts Act, 1888, s. 65, and the original writ and the order remitting the action have been lodged with the registrar of the county court, there is no longer any jurisdiction in the High Court to entertain an appeal against the order remitting the action to the county court.

Harris v. *Judge* [1892] 2 Q. B. 565, and *Duke* v. *Davis* [1893] 2 Q. B. 107, 260, followed.

APPEAL from an order made by Bucknill J. at chambers as after mentioned.

The plaintiffs sued the defendants in the High Court for a sum of 33*l.* 11*s.* 10*d.*, in respect of work done, materials supplied, and goods sold and delivered by the plaintiffs for the purpose of the installation of electric lighting in theatres belonging to the defendants at York, Hull, and Chatham. The plaintiffs took out a summons for leave to enter judgment for the amount of their claim under Order XIV., r. 1. The defendants took out a summons for an order that all matters in difference in the action should be referred to an arbitrator. These summonses were heard at the same time, when the Master made an order on the plaintiffs' summons under Order XIV. giving leave to defend, and remitting the action to the West London County Court, and dismissed the defendants' summons to refer the action. (1) The time for appealing against the Master's order having expired, without any

(1) It is not thought necessary for the purposes of this report to state facts which were material only to questions raised in argument as to the reference of the action under the Arbitration Act, 1889.

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appeal against that order, the original writ in the action and the order were lodged with the registrar of the county court in the usual way. The defendants subsequently took out a summons, by way of appeal to the judge at chambers against the Master's order, applying for an order setting aside the order of the Master remitting the action to the county court, and directing that all matters in difference in the action should be referred to an arbitrator, and that the defendants' time for appealing from the decision of the Master should be extended until the hearing of that application. On the hearing of that summons Bucknill J. made an order in the terms of the summons.

E. H. Tindal, Atkinson for the plaintiffs. (1) After the lodgment of the original writ and the order remitting the action with the registrar of the county court, there was no jurisdiction in the High Court, the action having become a county court action, to make any further order affecting it. By s. 65 of the County Courts Act, 1888, when the transfer of the action to the county court is complete, the case is to be treated as if the action had been commenced in the county court: *Harris* v. *Judge* (2); *Duke* v. *Davis* (3); *D'Errico* v. *Samuel.* (4) Therefore Bucknill J. had no jurisdiction to extend the time for appealing, or to reverse the Master's order.

E. M. Pollock, K.C., and *Newbolt*, for the defendants. The remitted action no doubt becomes a county court action, but the order remitting it remains an order of the High Court recorded in that Court, and that Court must continue to have jurisdiction to deal with its own order on appeal. No doubt any proceedings in the action after it has been remitted must be taken in the county court. The proceedings in question in *Harris* v. *Judge* (2) and *Duke* v. *Davis* (3) were clearly proceedings in the action. The appeal against the order remitting the action is not such a

(1) Various points were argued with regard to the question whether under the circumstances the action was one which ought to be referred under the Arbitration Act, 1889, but the arguments on those points are omitted as not being material to the point upon which the case was decided, and which is here reported.

(2) [1892] 2 Q. B. 565.

(3) [1893] 2 Q. B. 107, 260.

(4) [1896] 1 Q. B. 163.

proceeding. The observations of Bowen L.J. in *Duke* v. *Davis* (1) seem to shew that he thought that the High Court had jurisdiction to set aside the order remiting the action even after the writ and order had been lodged with the registrar.

[VAUGHAN WILLIAMS L.J. Those observations are only obiter dicta.]

The result of the contention for the plaintiffs would be that there might be no sufficient opportunity of appealing against the order for remittal of the action to the county court.

[VAUGHAN WILLIAMS L.J. The order for remittal of the action might meet that difficulty by providing that the lodgment of the writ and order with the registrar should not take place before a certain time.]

There is no provision for that in s. 65.

VAUGHAN WILLIAMS L.J. At the time when Bucknill J. made the order appealed against an order had been made remitting the action to the county court under the County Courts Act, 1888, s. 65, and the original writ and that order had been lodged with the registrar of the county court. That being so, I think that we can dispose of this case without entering into any of the questions which have been raised with regard to the Arbitration Act, 1889. Under those circumstances, it appears to me that the result of the decisions of the Court of Appeal in *Harris* v. *Judge* (2) and *Duke* v. *Davis* (3) is that there was no longer any jurisdiction in the High Court to make any order in the matter. Having come to that conclusion it is not necessary that I should go into any of the other matters which have been argued. I think that Bucknill J. had no jurisdiction to make the order which he made, and therefore this appeal must be allowed.

HAMILTON L.J. I am of the same opinion. An order for remitting the action to the county court having been made, and the writ and order having been lodged with the registrar of the county court before the summons on appeal to the learned judge was taken out, asking that the defendants might be allowed

(1) [1893] 2 Q. B. 260, at pp. 263, 264.

(2) [1892] 2 Q. B. 565.

(3) [1893] 2 Q. B. 107, 260.

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to appeal notwithstanding that the time for appealing had expired, I think that the action had then been effectually transferred to the county court, and all further proceedings therein must be taken in the county court, as if it had been originally commenced in that court, and, consequently, there was no longer any jurisdiction in the High Court to make an order such as Bucknill J. made. I think that we are concluded on this point by the decisions in *Harris* v. *Judge* (1) and *Duke* v. *Davis* (2), and that any difficulties supposed to arise in the working of s. 65 of the County Courts Act, 1888, are met in practice by the construction of that section in the way pointed out in *D'Errico* v. *Samuel.* (3)

Appeal dismissed.

Solicitors for plaintiffs: *Hutchison & Cuff.*
Solicitors for defendants: *Bruce Millar & Co.*

(1) [1892] 2 Q. B. 565. (2) [1893] 2 Q. B. 107, 260.
(3) [1896] 1 Q. B. 163.

E. L.

ASSOCIATED NEWSPAPERS, LIMITED, AND OTHERS, APPELLANTS *v.* MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON, RESPONDENTS.

1913
March 12, 13.

*Statute—Construction—Exemption from Taxes and Assessments — City of London—Poor Rate—County Rate — Education Expenses—Equalization Charge—*7 *Geo.* 3, *c.* 37, *s.* 51—*County Rates Act*, 1852 (15 *&* 16 *Vict. c.* 81), *s.* 26—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 68—*London* (*Equalization of Rates*) *Act*, 1894 (57 *&* 58 *Vict. c.* 53) *s.* 1, *sub-s.* 5 (*b*)—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 18.

By s. 51 of the statute 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

The effect of the County Rates Act, 1852, was to impose substantially new taxation within the meaning of the decision of the Court of Appeal in *Sion College* v. *London Corporation* [1901] 1 K. B. 617, and to impose it upon lands, tenements, and hereditaments rateable to the relief of the poor notwithstanding that the occupiers thereof enjoyed some personal or special exemption from paying poor rate.

Held, therefore, that the occupiers of the aforesaid lands were not exempt from payment of county contributions leviable in respect of (1.) education expenses of the county council under the Education Act, 1902, or (2.) equalization charge under the London (Equalization of Rates) Act, 1894, s. 1, sub-s. 5 (*b*), or (3.) deficiencies mentioned in s. 68, sub-ss. 4 and 5, of the Local Government Act, 1888.

CASE stated under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45).

The appellants gave notice of appeal to the Quarter Sessions for the City of London against a poor rate for the parish of the City of London made by the respondents on April 6, 1911. The following case was thereupon stated.

1. In a poor rate made by the respondents as overseers of the parish of the City of London on April 6, 1911, the several appellants were rated thereto in respect of the several hereditaments owned or occupied by them. The appellants jointly gave notice of appeal against the rate.

2. The facts relating to the several hereditaments in question were the same in each case, and one particular hereditament was taken as a specimen case, it being agreed that the decision

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of the Court on the questions raised should be applicable to all the appellants and all the hereditaments in question.

3. The particular hereditament is situate in an area of land reclaimed from the river Thames under the powers granted for that purpose by the statute 7 Geo. 3, c. 37.

4. Under the powers granted by that Act the ground and soil now forming the reclaimed area were enclosed and embanked, as to part at the expense of the Mayor, Aldermen, and Commons of the City of London in Common Council assembled, and as to the remainder at the expense of the owners and proprietors of the several wharfs or grounds abutting on the north side of the river Thames within the limits specified in the Act.

5. By the same Act the whole of the reclaimed area was vested in the owner or owners, proprietor or proprietors, of the then existing wharfs or grounds adjoining thereto according to their respective interests "free from all taxes and assessments whatsoever."

6. The hereditament is a portion of the ground so vested by the Act, and the owners thereof are the successors in title of the persons in whom that portion was originally vested.

7. By the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 5, the reclaimed area became (together with other areas) a part of the parish of the City of London which was formed by that Act. By s. 11 of that Act the respondents are the overseers of the parish of the City of London.

8. The powers of the overseers of the parish of the City of London to levy a poor rate are derived from the Poor Relief Act, 1601 (43 Eliz. c. 2), and subsequent statutes.

9. By virtue of the Education Act, 1902 (2 Edw. 7, c. 42), read with the Education (London) Act, 1903 (3 Edw. 7, c. 24), the London County Council are the local education authority for London. By s. 18 of the Education Act, 1902, the expenses under that Act of the council of a county shall (so far as not otherwise provided for) be defrayed out of the county fund.

10. By the London (Equalization of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 1, sub-s. 5 (*b*), where the contribution due from a parish under that Act exceeds the grant due to the parish the

London County Council shall for the purpose of meeting the excess levy on the parish a county contribution (called the equalization charge) as a separate item of the county rate.

11. By virtue of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68, the London County Council levy county contributions in order to meet any deficiency caused by the moneys standing to the general county account being insufficient to meet the expenditure for general county purposes, and in order to meet any deficiency caused by the moneys standing to any special county account being insufficient to meet the expenditure for any of the special county purposes chargeable to that account. Where any moneys required by the London County Council for either of the purposes specified in paragraphs 9 or 10 hereof, or for any other purposes for which the London County Council are by law entitled to levy money out of rates, are in law leviable, such moneys are levied by means of such county contributions aforesaid.

12. Such county contributions are levied by the county councils by means of county rates made according to the provisions of the County Rates Act, 1852 (15 & 16 Vict. c. 81). By s. 26 of that Act read together with s. 3, sub-s. 1, of the Local Government Act, 1888, precepts for the levy of the money required to be raised by a county rate are directed by county councils to guardians of the poor, who raise the money required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor. By ss. 40 and 41 of the Local Government Act, 1888, the county of London was created out of parts of the counties of Middlesex, Surrey, and Kent, as a separate county, and that county together with the county of the City of London (which was left to continue as a separate county) was made an administrative county for the purposes of that Act by the name of the Administrative County of London. By the same two sections the provisions of the Act were adapted to the special circumstances of the three last mentioned counties.

13. By virtue of the Poor Law Board's General Order dated April 22, 1842, and made under the powers of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 15, and by virtue

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of the Poor Law Board's Consolidated Order Amendment Order dated February 26, 1866, and made under the powers of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 11, the money required by guardians for the relief of the poor is raised by contribution orders addressed to the overseers of parishes, who are to pay such money out of the poor rates collected by them. The City of London Union is a poor law union for the purposes of the Poor Law Acts and consists of one parish only, namely, the parish of the City of London created by the City of London (Union of Parishes) Act, 1907, mentioned above. There is still a board of guardians for the City of London Union. A scheme has been duly made under s. 5, sub-s. 4, of the said Act of 1907.

14. By s. 12 of the City of London (Union of Parishes) Act, 1907, "every precept issued by any authority for the purpose of obtaining money which is ultimately to be raised out of a rate within the parish of the City of London . . . . shall be sent to the Common Council . . . . 'Precept' in this section includes any order, certificate, warrant or other document of a like character."

15. By virtue of the enactments and orders above specified, or some of them, precepts or contribution orders are addressed by the London County Council to the respondents for the payment of any sums required by the London County Council—as the authority for the Administrative County of London—to be levied in the parish of the City of London for any of the purposes specified in paragraphs 9, 10, and 11 hereof or other purposes authorized by law. The respondents pay any sums so required to be paid out of the proceeds of the poor rate levied by them on the parish of the City of London.

16. The Corporation of London levy a distinct county rate for the City of London for the purpose of raising moneys to meet expenditure which can by law be met out of a county rate. The county rate is levied in accordance with the provisions of the County Rates Act, 1852.

17. The poor rate made on April 6, 1911, was made at the rate of 2*s.* 6*d.* in the pound and included the sums of money required to meet the precepts of the London County Council.

In that rate the following amounts in the pound are included for the purposes aforesaid, namely:—

	d.	
Education	$11\frac{2}{16}$	in the pound.
Other purposes of the London County Council . . .	$7\frac{12}{16}$	„ „
Equalization charge . . .	3	„ „
Total to meet London County Council's precepts . . .	1s. $9\frac{14}{16}$d.	„ „

The hereditament was assessed only to that part of the poor rate which was required to raise the sums needed to meet the precepts of the London County Council. The amount assessed in respect thereof was 55*l.* 1*s.* $0\frac{1}{2}$*d.*, being 1*s.* $9\frac{14}{16}$*d.* in the pound of the rateable value of the hereditament.

18. After the passing of the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), and before the passing of the Education (London) Act, 1903, the amount required to be raised for the purposes of elementary education was raised as part of the consolidated rate levied under the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.). In the case of *Sion College* v. *London Corporation*, in the Queen's Bench Division [1900] 2 Q. B. 581 and in the Court of Appeal [1901] 1 K. B. 617, it was decided on a special case stated on an appeal to quarter sessions that land within the reclaimed area in question was liable to pay a certain consolidated rate levied under the said provisions (including therein an amount required for the purposes of education). At the time of the passing of the statute 7 Geo. 3, c. 37, there was no rate, tax, or assessment for the purposes of education or including such purposes. After the passing of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and before the passing of the City of London Sewers Act, 1897, the expenses for elementary education raised in the City of London were paid by the Commissioners of Sewers out of the consolidated rate on the precept of the London School Board addressed to them.

19. The appellants contended:—

(1.) That by virtue of the statute of 7 Geo. 3, c. 37, they were not rateable to the poor rate in respect of the hereditament;

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(2.) That being by virtue of the statute as owners or occupiers of the hereditament free from all taxes and assessments whatsoever, they were not liable to pay the poor rate;

(3.) That by the same statute they were not rateable to a rate made for other purposes and chargeable on the poor rate, and that the exemption conferred upon them was not affected by any subsequent enactment;

(4.) That they were not liable to be assessed to such portion of the poor rate appealed against as was made for the purpose of raising sums required by the London County Council, such sums being only leviable by means of the poor rate.

20. The respondents contended with reference to the matters in dispute in this appeal :—

(1.) That the statute 7 Geo. 3, c. 37, only exempted the properties in question from rates and assessments made under enactments then in force and not since repealed, and did not extend to rates made under later enactments;

(2.) That moneys raised for the purpose of education are imposed by legislation subsequent to the statute of 7 Geo. 3, c. 37, and that the exemption conferred by that statute does not apply thereto;

(3.) That the occupiers of lands within the reclaimed area are not exempted by the statute of 7 Geo. 3, c. 37, from contributing to any of the purposes included in the rate for which the London County Council's precepts were or could be issued;

(4.) That the Local Government Act, 1888, has created a wholly new entity, namely, the Administrative County of London with a new governing body and new rating powers and new functions;

(5.) That the hereditaments within the reclaimed area are not exempt from the poor rate as now leviable in the parish of the City of London.

21. The question for the opinion of the Court was whether the appellants were liable to pay the sums assessed upon them in respect of the poor rate or any of them.

22. If the Court should be of opinion that the appellants were liable to pay the sums assessed upon them, the appeal was to be dismissed with costs and the rate was to be confirmed. If

the Court should be of opinion that the appellants were not liable to pay the sums assessed upon them, the appeal was to be allowed with costs. If the Court should be of opinion that the appellants were liable to pay certain only of the sums, then the Court was requested to make such order as to costs as should seem fit. It was agreed that the rate should be amended as might be required by the decision of the Court, and that the Court might make such further or other order as the Court should think fit.

Macmorran, K.C., and *Konstam*, for the appellants. The appellants are not liable to pay the sums assessed upon them. The special case makes it clear that the three constituent parts of the rate, namely, the education charge, the equalization charge, and the charge for the other purposes of the county council, are payable out of the county fund and levied by the machinery of the County Rates Act, 1852; that is to say, precepts for the levy of the money required to be raised by a county rate are directed to the guardians of the poor, who raise the money required in like manner as the money required by the guardians for the relief of the poor, in other words by contribution orders directed to the overseers of the parishes who pay the money out of poor rates collected by them. Thus the source from which the money comes is the poor rate.

These hereditaments are by the statute 7 Geo. 3, c. 37, s. 51, "free from all taxes and assessments whatsoever." It has been decided that this enactment exempts these hereditaments from liability to poor rate: *Rex* v. *London Gas Light Co.*(1) That ought to conclude this case in favour of the appellants. Before the passing of the statute of 7 Geo. 3 the poor rate had ceased to be levied exclusively for the relief of the poor. In the year 1739 by an Act of 12 Geo. 2, c. 29, a county rate for the repair of bridges and prisons and for maintenance of rogues and vagabonds was charged upon the poor rate. At the present time the purposes for which the county rate is levied have greatly increased in number, but with all its objects and purposes the county rate is still charged on the poor rate: *Farmer* v. *London*

(1) (1828) 8 B. & C. 54.

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and North Western Ry. Co. (1); or as part of the outgoings of the poor rate, as Wright J. said in *Islington Corporation* v. *London School Board* (2), distinguishing in this respect the county rate, which is part of the poor rate, from the general rate under s. 10, sub-s. 2, of the London Government Act, 1899 (62 & 63 Vict. c. 14), which is a distinct rate, although levied as if it were the poor rate. The decision of Wright J. was affirmed in the Court of Appeal (3), where Vaughan Williams L.J. again speaks of the county rate as being charged upon the poor rate. The poor rate is one indivisible rate. In the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), poor rate is said to mean "the assessment for the relief of the poor and for the other purposes chargeable thereon according to law." Since the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), education expenses are payable out of the poor rate: *Whitehaven Harbour Commissioners* v. *Whitehaven Union* (4); and a person whose qualification for the franchise depends upon his having paid poor rate cannot by tendering so much thereof as is applicable to the relief of the poor claim the right to vote as having paid the proportion of poor rates payable by him in respect of the premises he occupied: *Ash* v. *Nicholl.* (5) It has been held that the exemption in the Act of 7 Geo. 3, c. 37, covers not only the poor rate itself, but all taxes and assessments levied through the machinery of the poor rate: *Eddington* v. *Borman.* (6) That would include the county rate. Therefore the hereditaments are exempt.

Secondly, a statute which confers a special exemption on a particular hereditament is not affected by a subsequent statute imposing a general liability. This is only an example of the rule of construction that general statutes do not abrogate special statutes. This would decide the present case in favour of the appellants but for a construction which has been put upon the Act of 7 Geo. 3 by the Court of Appeal in *Sion College* v. *London Corporation* (7), that the statute only confers exemption

(1) (1888) 20 Q. B. D. 788.
(2) [1902] 2 K. B. 701.
(3) [1903] 2 K. B. 354.
(4) (1905) 94 L. T. 504.
(5) [1905] 1 K. B. 139.
(6) (1790) 4 T. R. 4.
(7) [1901] 1 K. B. 617.

from taxes and assessments in existence in the year 1766 or others substituted for them. This interpretation is supposed to be the result of the decision in *Perchard* v. *Heywood.* (1) But in that case the statute 38 Geo. 3, c. 40, expressly enacted that there should be no exemptions from the tax there in question but such as were expressly provided for in that Act, and these hereditaments were not so provided for. The decision of the Divisional Court in *Sion College* v. *London Corporation* (2) rests on a surer foundation, namely, an indication in the City of London Sewers Act, 1848, of intention to charge these hereditaments with the rate the subject of that Act, notwithstanding the exemption conferred by the Act of 7 Geo. 3, c. 37. It is always competent for Parliament by a later Act to repeal or abrogate an earlier Act. The question in each case is whether this has been done: see *London Corporation* v. *Netherlands Steamboat Co.* (3) The Court of Appeal in *Sion College* v. *London Corporation* (4) might have rested their decision on that ground; but even if the judgment of the Court is sound it does not affect the present case, because the poor rate together with its charges for purposes other than the relief of the poor was in existence in the year 1766; and therefore the appellants are exempt: *Williams* v. *Pritchard* (5); *Rex* v. *London Gas Light Co.* (6)

Ryde, K.C., and *Boydell Houghton*, for the respondents. No hardship will be inflicted by making these hereditaments liable to the imposition of the county rate. At the time when the land was reclaimed it was all below high water mark, and most of it was below low water mark. As to land so situate it is at least doubtful whether it was rateable at all; the better opinion is that such land was and is extra-parochial: *Reg.* v. *Musson* (7); *McCannon* v. *Sinclair* (8); *Bridgwater Trustees* v. *Bootle-cum-Linacre.* (9)

The question of the appellants' liability turns upon the effect of the County Rates Act, 1852. The decision of the Court

(1) (1800) 8 T. R. 468.
(2) [1900] 2 Q. B. 581.
(3) [1906] A. C. 263.
(4) [1901] 1 K. B. 617.
(5) (1790) 4 T. R. 2.
(6) 8 B. & C. 54.
(7) (1858) 8 E. & B. 900.
(8) (1859) 2 E. & E. 53.
(9) (1866) L. R. 2 Q. B. 4.

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Appeal in *Sion College* v. *London Corporation* (1) is binding upon this Court. Accordingly, if the County Rates Act, 1852, imposed substantially new taxation, the appellants are liable. That is what the Act of 1852 did. Moreover the Act shews an intention to charge these hereditaments notwithstanding their previous exemption from taxes and assessments. By s. 2 a number of justices of the peace were constituted a committee for the purpose of preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property rateable to the relief of the poor in every place, whether parochial or extra-parochial, or which in any place not maintaining its own poor would be liable to be rated for the relief of the poor if the place were a parish. By s. 21 justices of the peace in general or quarter sessions were empowered to order and direct a fair and equal county rate to be made for all the purposes to which county stock or rate was then or should thereafter be made liable at law according to the basis or standard for the time being in force; "and for that purpose to assess and tax every parish, township, and other place, whether parochial or extra-parochial," rateably and equally according to a certain pound rate upon the basis or standard hereinbefore mentioned of the full and fair annual value of the property "rateable to the relief of the poor therein, or which in any place not maintaining its poor would be liable to be rated for the relief of the poor if the said last-mentioned place were a parish, any law or statute to the contrary thereof notwithstanding"; and the justices of the peace were directed to "appoint proper persons within such extra-parochial or other places for the assessing, taxing, and rating such extra-parochial property, messuages, &c." This Act therefore took away the exemption formerly enjoyed by extra-parochial places. In any case the rates created by the Education Act, 1902, the London (Equalization of Rates) Act, 1894, and the Local Government Act, 1888, are new or substantially new assessments within the meaning of the decision of the Court of Appeal in *Sion College* v. *London Corporation*. (1)

Macmorran, K.C., in reply.

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CHANNELL J. This case raises a point of some difficulty. I think that a few words will serve to elucidate and explain the various cases upon this point from *Williams* v. *Pritchard* (1) down to *Sion College* v. *London Corporation*. (2) In each of these cases there are two Acts of Parliament to be considered, first the exempting Act, and secondly the charging Act. In some cases it is necessary to consider both the Acts; in others it may happen that the construction placed upon one of the Acts makes it unnecessary to consider the other Act.

In the present case the exempting Act, namely, the statute 7 Geo. 3, c. 37, contains the exempting words "free from all taxes and assessments whatsoever." The exemption is in general terms. It may have been intended to include all taxes and assessments whatsoever, present or future, then imposed or to be imposed by any future Act of Parliament. But even if the exemption had been enacted in those very terms, it is plain that such an enactment could not have bound future Parliaments; it would still be open to Parliament at a future day to repeal that provision expressly or, without expressly repealing it, to impose a new tax upon these tenements notwithstanding the Act of 7 Geo. 3. Accordingly, if the true intention of the charging Act is, notwithstanding the exempting Act, to charge the tenements purporting to be exempt, it is unnecessary to hark back and consider whether the exempting Act has purported to confer exemption from future liabilities or not. Equally, if the true intention of the exempting Act is to confer exemption only from existing taxes and assessments, in that case it is unnecessary to consider whether the true intent of the charging Act is to charge the tenements in question notwithstanding a prima facie exemption. The only question in that case is whether the intention of the charging Act is to charge the tenements in question at all. That explains to my mind the different ways in which this matter has been dealt with in former cases, including *Sion College* v. *London Corporation*. (2) In that case the judgment of this Court was to a great extent based upon the construction put upon the charging Act. The Court of Appeal did not disagree with that construction, although that Court decided

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the case upon a different ground, namely, on the construction of the exempting Act.

In the view of this Court, even if the Act of 7 Geo. 3 did exempt the premises in question from future liabilities, there was yet in the charging Act, the City of London Sewers Act, 1848, a clear indication of intention to charge them notwithstanding the exemption. Therefore it was unnecessary for this Court to consider the effect of the earlier Act. That was the view taken by Grose J. and also by Lord Kenyon in *Perchard* v. *Heywood* (1), although the Chief Justice there added that he would have come to the same conclusion on consideration of the earlier Act also. The Court of Appeal in *Sion College* v. *London Corporation* (2) held that the exempting Act was to be construed as exempting only from old taxes, including in that term an old tax reimposed under a different form, and not as professing to exempt from anything more. In the opinion of that Court the tax created by the City of London Sewers Act, 1848, imposed substantially a new tax. Having come to that conclusion it was not necessary for the Court of Appeal to consider the ground on which this Court based their decision, namely, on the intention exhibited in the charging Act to charge notwithstanding exemptions. These considerations explain the earlier cases, which are all quite consistent. For our part we are bound by the decision of the Court of Appeal in *Sion College* v. *London Corporation* (2) to hold that on the true construction of the statute 7 Geo. 3, c. 37, the words "free from all taxes and assessments whatsoever" mean free from all taxes and assessments whatsoever now existing, notwithstanding they may be slightly changed in form, provided they are substantially the same, but not free from and not in any way exempt from any future taxation. Consequently it is not necessary to consider whether the charging Act in this case shews an intention to charge notwithstanding a prior exemption.

A large number of Acts of Parliament are offered for our consideration in this special case, but it is not disputed that all the items of taxation from which exemption is claimed derive their origin from the County Rates Act, 1852. We have therefore to consider whether the county rate was with reference

(1) 8 T. R. 468. (2) [1901] 1 K. B. 617.

to these tenements substantially new taxation. If it was not, but was only a new form of old taxation prior to 7 Geo. 3, c. 37, then these premises would be exempt; but if it was substantially new taxation then they would not be exempt. I have no doubt that it was substantially new taxation. It is true that there were Acts of Parliament before the statute of 7 Geo. 3, c. 37, which did through the machinery of the poor rate levy contributions for purposes other than the relief of the poor, for example for expenses connected with bridges and prisons, and I believe that there were other instances of the like nature; but, notwithstanding that, this county rate even in 1852 embraced so much beyond what could have been imposed before 7 Geo. 3 that, applying the principle which guided the Court of Appeal in *Sion College* v. *London Corporation* (1), we ought to hold that it was substantially new taxation. In that case the Court were dealing with a consolidated rate which included a large number of miscellaneous expenses, some few of which had certainly existed before 7 Geo. 3. I referred to this fact incidentally in my judgment in this Court (2), and it was assumed to be the fact in the Court of Appeal. But in the view of that Court the rate was one rate for a large number of things, most of which were new, and the taxation was none the less new taxation within the principle there laid down, because there were some small items included in it which might in some way or other have been charged through the poor rate or otherwise at the date of 7 Geo. 3.

That being so, and taking it to be new taxation, there remains only one question, and that really is the only question that is of substantial difficulty in the present case. It is whether we can find indications in the County Rates Act, 1852, of an intention to charge tenements which were in the position of these tenements with county rate. Having come to the conclusion that the imposition of the county rate was new taxation, it is still necessary to find words which indicate an intention to charge the new imposition upon tenements in this category. These tenements are very exceptional and special. They were not very likely to have been in the actual contemplation

(1) [1901] 1 K. B. 617. (2) [1900] 2 Q. B. 581, at p. 586.

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in fact of the Legislature in 1852, but that question does not really concern us; apart from such speculations we have to construe the Act of 1852 and see whether upon its fair interpretation it can be considered to have imposed this new liability upon these premises. It is here that we meet with the difficulty. I did not at first see much importance in the argument of Mr. Ryde as to the intention to be imputed to the Legislature in enacting the statute of 7 Geo. 3 from the fact that they were exempting from taxation lands which had been between the low water and high water mark and were therefore extra-parochial. Most probably when conferring exemption "from all taxes and assessments whatsoever" the Legislature had in mind the fact that at that time the unreclaimed foreshore was not paying any taxes, and that as a result of its being enclosed and reclaimed a new subject of taxation was being created and no injustice was being done to any parish or other body that drew any money out of the land. Still I do not think that the words "free from all taxes and assessments" were intended to mean free from all taxes and assessments so long as the hereditaments remain extra-parochial, but that when they become intra-parochial they are to be chargeable. Looking at the Act as a whole, I think that the exemption from taxation was conferred to encourage the people to spend their money in reclaiming the land. So much for that argument.

To return to the County Rates Act, 1852, this was an Act to consolidate and amend the statutes relating to the assessment and collection of county rates in England and Wales. It recites that it is expedient that the laws relating to the assessing and collection of county rates should be amended, and that the statutes then in force relating to that subject should be consolidated into one Act. It was substantially an Act relating to machinery rather than to liability, and deals much more with the mode of levying the county rate than it does with those who are to pay it. It is mainly an Act for machinery and for consolidation. Sect. 2, which is one of the important ones, enacts that the committee who were to deal with the matter are appointed "for the purpose of preparing a basis or standard for fair and equal county rates"—the basis or standard is wanted for the

purpose of assessing between the different contributing areas the amount that each area shall pay—"such basis or standard to be founded and prepared rateably and equally according to the full and fair annual value of the property, messuages, lands, tenements and hereditaments rateable to the relief of the poor in every parish, township, borough, or place, whether parochial or extra-parochial, within the respective limits of the said justices' commissions, or which in any place within such limits not maintaining its own poor would be liable to be rated for the relief of the poor if such last mentioned place were a parish, or of altering and amending such basis or standard from time to time as circumstances may require." That seems to indicate an intention to charge with this county rate premises which in fact were not then paying poor rate, including places which were formerly more numerous than they are now, namely, extra-parochial places, and to extend the liability to poor rates to that considerable class of cases where poor rates were not in point of fact paid. The words used are "according to the full and fair annual value of the hereditaments rateable to the relief of the poor." All that was necessary to bring a hereditament within the cognizance of the county authority was that it should be rateable to the relief of the poor. If there were premises which would be rateable but for their having some special exemption from the payment of the rates, those premises would come into the county rate basis under those words. That may possibly be important. The next section of any importance is s. 26, which provides machinery for raising the money through precepts, and the ultimate effect is that the guardians are to demand the money of the overseers, and then by other Acts the overseers have to raise the amounts required of them, and to raise it out of the poor rate.

The question is, Can we say that upon the fair construction of that Act of Parliament it was not intended to impose this new liability upon premises which because of their local situation were free from all rates and taxes whatsoever? We think that the exemption is only an exemption from the payment of the then existing taxes, and that, in view of an indication in the Act of 1852 of an intention to charge extra-parochial places and places which did

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not maintain their own poor, we cannot say that it was not intended to impose the rate generally and that it was intended to exempt from the rate any person who enjoyed a personal or special exemption from paying poor rate. It seems to me that from the first the authority had power to make rates in these places when they became parochial. As soon as that event happened so that there was a rating authority over them, that rating authority might have put them on all their lists and rated them for the purpose, not of levying the poor rate and the other old rates from which they were exempt, but of rendering them subject to any new impositions. Consequently we cannot say that the hereditaments were not rateable within the meaning of s. 2 of the Act of 1852. The material consideration is that this county rate is substantially new taxation within the decision of the Court of Appeal in *Sion College* v. *London Corporation* (1), and that upon the view taken by that Court of the Act of 7 Geo. 3, c. 37, the exemption does not prevail.

It is not necessary to go through the three items making up the amount from which exemption is claimed. The whole case turns on the effect of the County Rates Act, 1852, and of course of the subsequent Acts extending the scope of the county rate. It is through that Act that these hereditaments become chargeable. On these grounds we have come to the conclusion that the judgment should be for the Mayor, Aldermen, and Commons of the City of London.

BRAY J. I am of the same opinion. The two statutes we have to consider are the exempting statute of 7 Geo. 3, c. 37, and the County Rates Act, 1852. I do not feel any difficulty in construing s. 51 of the Act of Geo. 3, because the decision in *Sion College* v. *London Corporation* (1), which is binding upon us, lays it down that this statute only exempts owners and occupiers from existing burdens and others of a like kind. The burdens in question are the education rate, the equalization rate, and the rate for other purposes of the London County Council. Clearly all these are new burdens and they are not in any way of a like class with any burden in existence when the Act of 7 Geo. 3,

(1) [1901] 1 K. B. 617.

c. 37, was passed. Therefore Mr. Macmorran cannot rely on that enactment by itself. But he argues that the premises in question are not rateable to the relief of the poor, and from that he draws the conclusion that there is no charge upon the premises in respect of the burdens I have mentioned. This is the real difficulty in the case and it arises thus: All these burdens are payable out of the county fund; the county fund has to be supplied out of the county rate; and the county rate is imposed and regulated by the County Rates Act, 1852. Mr. Macmorran contends that the county rate is not leviable upon any tenements which are not rateable to the relief of the poor; these premises are not rateable to the relief of the poor; therefore no charge was imposed upon them. In my opinion the county rate as constituted by the Act of 1852 was a new burden. As it existed before that Act it may have included some small matters in respect of which there were liabilities at the date of the statute 7 Geo. 3, c. 37; but substantially it was a new rate. If it had been imposed by the Act of 1852 in general terms on all lands, tenements, and hereditaments there would be no exemption at all. Any exemption would have to be a fresh exemption newly enacted. One looks to see first if there is any indication in the Act of 1852 of any intention to exempt these tenements from a new charge, but one looks in vain for words indicating any such intention. On the contrary there is some indication of an intention to include extra-parochial places which might otherwise not be included. But although there is no indication of any such intention, nevertheless the Act may have failed to impose this burden of the county rate upon premises in this position. We have therefore to look at the County Rates Act, 1852. By s. 2 of that Act the basis or standard for the county rate is to be prepared rateably and equally according to the full and fair annual value of "the property, messuages, lands, tenements, and hereditaments rateable to the relief of the poor." In my opinion the words "lands and tenements rateable to the relief of the poor" mean all lands and tenements which in the ordinary course are capable of being rated to the relief of the poor; they do not exempt a tenement which by a statute passed many years before is free from all taxes and assessments whatsoever. Such

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a tenement may nevertheless be rateable to the relief of the poor in the sense in which the words are used here. If that be so then this county rate is imposed upon these premises and other premises of a like character, and the rate is payable. This conclusion I have come to mainly from two considerations—first, that the exempting statute did not intend to exempt the owners and occupiers from future taxes and future burdens, and the burdens in question were clearly future taxes and future burdens; and, secondly, that I can find no indication in the Act of 1852 of any intention to give any exemption to any owners or occupiers in that position.

LORD COLERIDGE J. The lands and premises in question were exempted by the Act of 1766 from the payment of all taxes and assessments whatsoever. That exemption extends to existing taxes and assessments and to those taxes and assessments, and only those, which are in the future of the same nature as the existing taxes in 1766. The amount of them does not matter, the exemption applies. If they change their character or if any assessments substantially new are imposed they are outside the exemption. The rate for the relief of the poor then existed. It included certain other objects mainly connected with criminals and with bridges. The lands were held to be exempt from land tax by *Williams* v. *Pritchard* (1) because that tax was in existence in 1766, and the special exemption was not overridden by the general terms of the later Act which imposed the tax. On the other hand a new tax such as the window tax was held outside the exemption in *Perchard* v. *Heywood* (2), and although the statute imposing the tax used words which specially destroyed the exemption, the decision of the Court was not solely founded upon that, but went also on the ground that the tax was a new tax or assessment. So also the poor rate has been held within the exemption in the case of *Rex* v. *London Gas Light Co.* (3), for the poor rate there dealt with was substantially of the same nature as the poor rate of 1766.

Step by step the moneys required for the relief of the poor as

(1) 4 T. R. 2. (2) 8 T. R. 468.
(3) 8 B. & C. 54.

well as for other expenses not the subject of any tax or assessment in 1766 have been met by the machinery of levying them on the properties subject to the poor rate by means of the county rate. Is this comprehensive county rate one of the taxes or assessments existing in 1766, or of the same nature as any of the same? So far as the county rate comprehends taxes or assessments not coming within the said category, that is to say, so far as it comprehends new taxes or impositions, it falls within the same category as the consolidated rate dealt with by the Court of Appeal in *Sion College* v. *London Corporation.* (1) In such cases the special exemption does not apply, being limited to taxes and assessments in existence at the time of the exemption and to such imposed after that date as are of the same nature.

Then comes the final question: Are these taxes imposable upon these premises which are exempt from paying the poor rate under the exemption of 1766? I think these premises may be described as premises of the character of those which are rateable to the relief of the poor, though they enjoy a special exemption from paying such portion of the poor rate as is strictly limited to such relief. The Act of 1852 contemplated assessing the county rate on all properties rateable and rateable to the poor, but these words I think are only words of description applicable to the properties. They describe these properties. If it had been intended to exempt these properties from taxes and assessments which from their nature or novelty are not within the exemption in the Act of 1766, the Legislature I think would have used clearer terms to effect that intention.

On these grounds I agree with the judgments which have been delivered.

Judgment for respondents.

Solicitor for appellants: *Wm. E. Hart.*

Solicitor for respondents: *Sir H. H. Crawford.*

(1) [1901] 1 K. B. 617.

W. H. G.

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April 2.

In re RENISON.
Ex parte GREAVES.

Bankruptcy—Judgment Creditor — Garnishee Order Absolute — Bankruptcy Notice—"Execution stayed"—Secured Creditor—Bankruptcy Act, 1883 (46 *& 47 Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

By s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, a debtor commits an act of bankruptcy if a creditor has obtained a final judgment against him for any amount and, execution thereon not having been stayed, has served on him a bankruptcy notice under the Act, which notice is not complied with as directed by the sub-section.

A judgment creditor obtained a garnishee order absolute whereby it was ordered that the garnishees should pay to the judgment creditor the amount of the judgment debt out of a debt due from them to the judgment debtor. Nothing was in fact paid under this order :—

Held, that execution on the judgment was not thereby stayed within the meaning of the section, but that a bankruptcy notice might properly issue notwithstanding the garnishee order.

Held, also, that the bankruptcy notice might properly issue for the full amount of the judgment debt and that the judgment creditor was not bound to give credit for the value of the security, if any, afforded by the garnishee order.

Appeal from the county court of Cheshire holden at Stockport.

On November 13, 1912, Mary Elizabeth Greaves, widow, recovered judgment in the King's Bench Division against M. A. Renison for 1439*l.* 3*s.* 10*d.* and 5*l.* 6*s.* costs.

On November 28, 1912, a garnishee order nisi, dated November 14, whereby it was ordered that all debts owing or accruing due from the Sukkoria Goldfields, Limited, to the judgment debtor should be attached, was made absolute, and it was ordered that the garnishees should forthwith pay to the judgment creditor 1444*l.* 9*s.* 10*d.* out of the debt due from them to the judgment debtor together with 3*l.* 13*s.* costs of the garnishee proceedings.

No money was paid under this order.

On February 6, 1913, a bankruptcy notice of even date was served on M. A. Renison directing him to pay to Mary Elizabeth Greaves the sum of 1444*l.* 9*s.* 10*d.*, the amount due under the judgment above mentioned.

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On February 18 M. A. Renison applied to set aside this bankruptcy notice.

The registrar dismissed the application.

M. A. Renison appealed.

E. W. Hansell, for the appellant. This is not a final judgment whereon execution has not been stayed. Garnishee proceedings are a process of execution. Once execution has issued, further process of execution is stayed within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883: *Ex parte Ford, In re Ford* (1); *In re Phillips, Ex parte Phillips* (2); *In re Follows, Ex parte Follows.* (3)

[PHILLIMORE J. referred to *In re Sedgwick, Ex parte Sedgwick* (4), and *In re Bond, Ex parte Capital and Counties Bank.* (5)]

Secondly, this creditor by obtaining the garnishee order absolute has acquired a security for his debt. He must give credit for the value of that security and can only issue a bankruptcy notice for the balance: *In re Raymond, Ex parte Raymond.* (6) A judgment creditor cannot issue a bankruptcy notice for a sum greater than that for which he may issue execution: *In re Child, Ex parte Child* (7); *In re Miller, Ex parte Furniture and Fine Arts Depositories.* (8)

J. D. Crawford, for the respondent, was not heard.

PHILLIMORE J. This appeal must be dismissed. By s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, a creditor who has obtained final judgment, execution thereon not having been stayed, may serve a bankruptcy notice. The Court has construed those words as meaning a creditor who is in a position to issue execution. A creditor who has already issued execution cannot issue a second execution until the former one is disposed of, either by being set aside, or by a return of nulla bona, or in some other way. A creditor proposing to issue a second execution while a former execution is pending is in the position of a person whose execution is stayed within the meaning of this enactment.

(1) (1886) 18 Q. B. D. 369.
(2) (1888) 5 Mor. 40.
(3) [1895] 2 Q. B. 521.
(4) (1888) 5 Mor. 262.
(5) [1911] 2 K. B. 988.
(6) (1892) 9 Mor. 108, note.
(7) [1892] 2 Q. B. 77.
(8) [1912] 3 K. B. 1.

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Accordingly a creditor who has issued a writ of fieri facias cannot while that writ is outstanding issue a bankruptcy notice. But this somewhat technical construction of the enactment does not extend beyond a restricted class of cases. The result of the decision of the Court of Appeal in *In re Sedgwick, Ex parte Sedgwick* (1) and the determination of this Court in *In re Bond, Ex parte Capital and Counties Bank* (2) is that a judgment creditor may issue equitable execution and obtain a charging order on the shares of his debtor or a receiver of the interest of his debtor in a partnership without prejudicing his right to issue a bankruptcy notice; and upon the same principle, although this has not yet been decided, he may have a garnishee order absolute without prejudice to his right to issue execution by way of fieri facias or levari facias or other appropriate writ of execution. In the same way he is not precluded from issuing a bankruptcy notice. In the present case the creditor has obtained a garnishee order absolute; that does not preclude him from issuing execution; so neither does it preclude the issue of a bankruptcy notice. It is true that a form of execution which would in any way impede the debtor or hinder him in the payment of his debt would give rise to other considerations, but there is no evidence that the garnishee order in this case has in any way impeded the debtor. On the contrary, nothing has been realized by means of it. Therefore the first point fails.

Then it is said that the garnishee order is in the nature of a security and must be worth something, and that in the absence of a statement on oath that the creditor can realize nothing by means of it, the amount of the judgment debt must be reduced by a sum representing the value of the security. But the mere fact that a judgment creditor has a security for his debt does not affect his right to issue a bankruptcy notice. A petitioning creditor when he makes his proof must value any security he may have for payment of his debt, not however for the benefit of the debtor, but for that of the other creditors, and in order to ensure that he does not through his security get more than he is entitled to get out of the bankrupt's estate. This argument purports to be based on

(1) 5 Mor. 262. (2) [1911] 2 K. B. 988.

the case of *In re Raymond, Ex parte Raymond* (1); but when that case is considered the argument reduces itself to a play upon words. There it had been agreed that certain securities should be assigned to the creditor as part payment of a debt of 12,000*l.*; a bankruptcy notice had issued following upon a judgment for the whole 12,000*l.*; the assignment of securities to be made in pursuance of the agreement had not been completed; and the Court merely said, following *In re Child, Ex parte Child* (2), that if the assignment had been completed, the bankruptcy notice could not have issued for the whole debt of 12,000*l.* That is no authority for the position that if a judgment creditor holds a security for the payment of the judgment debt he must have it valued and in his bankruptcy notice give credit for the amount of its value. The argument for the appellant is a play upon the word "security." For these reasons the appeal must be dismissed.

HORRIDGE J. I am of the same opinion. The first point is covered in principle by the decision in *In re Bond, Ex parte Capital and Counties Bank.* (3) It is true that if there had been any evidence that the creditor had, in the words of Lord Esher M.R. in *In re Sedgwick, Ex parte Sedgwick* (4), "done something which prevents the debtor in fact from complying with the summons," i.e., the requirement embodied in the bankruptcy notice, we should have to consider that evidence. But in the present case there is no such evidence.

As to the second point, I know of no rule that a judgment creditor must value any security he may have for the payment of his debt before he can issue a bankruptcy notice. The case of *In re Raymond, Ex parte Raymond* (1), is no authority for any such rule. The word "securities" in that case is used in a different sense to that in which the appellant uses it in the present case. In that case it was agreed that certain securities were to be assigned to the creditor, not as security for, but as part payment of, the original debt. An action to recover the debt was referred to an official referee. The assignment of the

(1) 9 Mor. 108, note.
(2) [1892] 2 Q. B. 77.
(3) [1911] 2 K. B. 988.
(4) 5 Mor. 262.

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securities had not been completed, and the official referee gave judgment for the full amount. On appeal the Divisional Court and the Court of Appeal, without setting aside the judgment, directed the official referee to value the securities. That was because the securities when duly assigned were to go in part payment of the debt; they were not securities for its payment. This appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellant: *Stibbard, Gibson & Co., for Wood & Gartside, Ashton-under-Lyne.*

Solicitors for respondent: *Grundy, Kershaw, Samson & Co.*

W. H. G.

C. A.

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Jan. 27; *Feb.* 3.

[IN THE COURT OF APPEAL.]

SHACKLETON *v.* SWIFT.

[1912 S. 15.]

Local Government—Lunatic—Detention of Alleged Lunatic in Workhouse—Certificate of Medical Officer—Action for False Imprisonment against Workhouse Master—No Want of Good Faith or Reasonable Care—Stay of Proceedings—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *s.* 330.

By s. 330, sub-s. 1, of the Lunacy Act, 1890, "A person who after the passing of this Act . . . . does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care."

The plaintiff was received as an alleged lunatic into a workhouse of which the defendant was the master under an order of a relieving officer made under s. 20 of the Lunacy Act, 1890, and requiring the defendant to receive and detain her in the workhouse for a period of three days. During that period a justice visited and examined the plaintiff but made no order regarding her, but the medical officer of the workhouse, before the expiration of the three days, gave a certificate in writing under s. 24 of the Act for her detention for fourteen days from its date. The plaintiff was detained in the workhouse for six days from the date of the certificate, when she was discharged by order of the medical officer. The plaintiff having brought an action for false imprisonment on the ground that her detention beyond the original period of three days was unauthorized, in the absence of an order of a justice:—

Held, that the Act gave special protection to officers and others acting

under its powers in cases where, although they might have misconstrued the Act, and although they might have done things which they had no jurisdiction to do, they had acted in good faith and in a reasonable manner.

Held, further, that on the facts there was no evidence that the defendant had acted otherwise than in good faith and with reasonable care, even assuming that the further detention of the plaintiff beyond the original three days was unauthorized in the absence of an order of a justice.

Semble, that the further detention of the plaintiff beyond the original three days was authorized by the medical officer's certificate.

APPEAL of the defendant from an order of Rowlatt J. at chambers by which he set aside an order of Master Archibald staying all proceedings in the action under s. 330 of the Lunacy Act, 1890.

The action was brought to recover damages for the alleged wrongful detention of the plaintiff as an alleged lunatic in a workhouse of which the defendant was the master.

From the pleadings and affidavits it appeared that on and before July 22, 1911, the plaintiff, Mary Helen Shackleton, was living at Burnley in her father's house. On July 22, 1911, one Cryer, a relieving officer of the Burnley Union, acting under s. 20 of the Lunacy Act, 1890 (1), removed the plaintiff, as being an alleged lunatic, from her father's house to the Burnley workhouse. He also made and signed a written order, directed to the defendant, in the following terms :—

"Burnley Union
July 22, 1911.

"To the Master of the Workhouse at Burnley.

"Receive into the workhouse one Mary Helen Shackleton, 15, Canning Street, Burnley
a person deemed to be a lunatic, who is not under proper care or control
and whom, I am satisfied, it is necessary for the public safety and her own welfare to place under care and control, until notice or information can be given, or she can be brought before a justice
and relieve and detain her in the said workhouse for a period not

(1) See note, post, p. 321.

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exceeding three days, unless otherwise ordered before the expiration of such period.

"(Signed) Jas. Cryer
R.O."

[The order then set out s. 20 of the Act.]

The relieving officer indorsed upon the order and signed the following: "The patient is threatening to commit suicide. Threatens to kill her stepmother, also her father. She is a professed spiritualist. 38 years. Wesleyan. Broker."

The plaintiff was accordingly received into the workhouse about 10 P.M. on July 22. On July 25, 1911, Mr. Race, a justice of the peace for the borough, acting upon notice given to him by the relieving officer, visited and saw the plaintiff at the workhouse in the presence of the medical officer of the union, but made no order for the reception of the plaintiff into an institution for lunatics or otherwise, thinking it better not to do so at once, and on the same date Dr. A. W. Eadie, the medical officer of the workhouse, acting under s. 24, sub-s. 1, of the Lunacy Act, 1890, gave a certificate in writing that the plaintiff was a lunatic (for which he gave the grounds of his opinion) and a proper person to be allowed to remain in the workhouse as a lunatic. This certificate was in the following terms:—

"Certificate as to a Pauper Lunatic in a Workhouse.

"I, the undersigned medical officer of the workhouse of the above-named union, hereby certify that I have carefully examined into the state of health and medical condition of Mary Helen Shackleton, a pauper in the said workhouse, and that she is in my opinion a lunatic and a proper person to be allowed to remain in the workhouse as a lunatic and that the accommodation in the workhouse is sufficient for her proper care and treatment separate from the inmates of the workhouse not lunatics (or that her condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that she shall be kept separate). The grounds for my opinion that the said Mary Helen Shackleton is a lunatic are as follows: The patient is excited in manner and speech. For observation. (Signed) A. W. Eadie."

By s. 24, sub-s. 2, of the Lunacy Act, 1890, a certificate under that section is sufficient authority for detaining a lunatic against his will for fourteen days from its date. On July 31, 1911, the plaintiff was discharged from the workhouse by the medical officer, he being of opinion that her medical condition had become satisfactory.

On January 20, 1912, the writ in the present action was issued, and on November 11, 1912, the plaintiff delivered a statement of claim, in which she alleged that on July 22, 1911, the relieving officer for the Burnley Union wrongfully and unlawfully removed her, as an alleged lunatic, from the house where she lived with her father to the workhouse of the Burnley Union, and by an order in writing of that date required the defendant, who was the master of the workhouse, to receive and detain the plaintiff in the workhouse for a period not exceeding three days, and that the defendant received and detained the plaintiff from July 22 to July 31.

By his statement of defence the defendant said that he was required by the relieving officer of the union to receive and detain the plaintiff for three days, and that on July 25, 1911, a justice of the peace visited and saw the plaintiff at the workhouse with the medical officer of the union and made no order for the reception of the plaintiff into an institution for lunatics, thinking it better not to do so at once, and that on the same date the medical officer, acting under s. 24, sub-s. 1, of the Lunacy Act, 1890, certified that the plaintiff was a lunatic (for which he gave the grounds of his opinion) and a proper person to be allowed to remain in the workhouse as a lunatic. The defendant further said that he acted in good faith and with reasonable care and was not liable in these proceedings by reason of the provisions of the Lunacy Act, 1890.

The defendant took out a summons for an order that the action should be stayed on the ground that under s. 330 of the Lunacy Act, 1890, the action was not maintainable in the absence of any allegation that the defendant had not acted in good faith and with reasonable care in the detention of the plaintiff, and on the ground that it was not alleged in the statement of claim and that no facts were stated therein to shew or

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suggest that the defendant did not act in good faith and with reasonable care in the premises.

In support of the summons the relieving officer made an affidavit in which he said that when he removed the plaintiff to the workhouse he satisfied himself that she was deemed to be a lunatic and was not under proper control; that he arrived at the workhouse with the plaintiff about 10 P.M. on July 22, and delivered her into the care of the officer on duty in the mental wards; that at the same time he gave the officer the order signed by him, and that within three days he gave notice to Mr. Race, a justice of the peace for the borough of Burnley.

The medical officer, Dr. Eadie, made an affidavit in which he said that he interviewed the plaintiff on her admission to the workhouse; that he formed the opinion that she had been properly brought to the workhouse as an alleged lunatic, and that it was right and necessary to detain her there; that he was present when Mr. Race, a justice of the peace, interviewed the plaintiff at the workhouse; that the justice thought it better not to sign immediately an order for the reception of the plaintiff into an institution for lunatics, and that he agreed with him, and thought the plaintiff should be kept for observation at the workhouse; that accordingly, acting under s. 24, sub-s. 1, of the Act, he made and signed a certificate, in accordance with his honest opinion and after carefully examining her, that the plaintiff was in his opinion a lunatic, with the grounds of his opinion. And the defendant made an affidavit in which he said that, when the plaintiff was brought to the workhouse, he was absent therefrom on his annual leave; that he returned about 11.30 P.M. on that day, and that he learned on the following day that the plaintiff had been received into the workhouse, and that the order of the relieving officer was brought to him; that he considered that under s. 20 of the Act, upon the order of the relieving officer, he had no option and was bound to receive, relieve, and detain the plaintiff at the workhouse for the full term of three days mentioned in the order; that subsequently he was informed that the plaintiff had been visited by Mr. Race, a justice of the peace; that he never received any notice or intimation from Mr. Race that the plaintiff was not insane or a

lunatic and ought not to be detained as a lunatic in the workhouse; that on or shortly after July 25 the certificate of Dr. Eadie was brought to him and he perused it; that he considered and submitted that under s. 24, sub-ss. 1, 2, and 3, upon that certificate he had no option and was bound to detain the plaintiff in the workhouse for the further fourteen days mentioned in that certificate unless in the meantime the said medical officer should authorize her discharge; that he had no knowledge of or communication with the plaintiff until after her admission to the workhouse; that she was not subjected to any exceptional treatment whilst in the workhouse; that she was detained till July 31, when on the report of the medical officer she was discharged; that the accommodation in the workhouse was sufficient for her proper care and treatment separate from inmates who were not lunatics, and that no complaint was made by her, and that no facts were stated in the statement of claim to shew that he had not acted in good faith and with reasonable care.

The plaintiff made an affidavit, of which the material parts were as follows:—

"(3.) The next day I explained the situation to Mr. and Mrs. Swift" (meaning the defendant and his wife). "Mrs. Swift said to Mr. Swift, 'This is no place to bring the girl to. She has been tricked. It's just a family dispute. The girl's all right.' I asked if I might see an independent doctor and my solicitor, Mr. Waddington, but Mr. Swift said it was against the rules to call in an outside doctor, and with regard to a lawyer I must see to that after my release.

"(4.) I remember a gentleman coming into the room in which I was at the asylum two or three days after I was taken there, but as I did not know he was a justice of the peace I did not complain to him. After he went I was put in the imbeciles' day room, which contained some twenty patients, some deformed and some paralysed.

"(5.) On July 29, 1911, I urged Dr. Eadie very hard to get me let out, as he must see I was not a lunatic. He said, 'If I'd my way, I'd give you your discharge this minute; but I promised Mr. Cryer I would detain you until Monday, the 31st.'"

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In affidavits in reply the defendant and his wife denied the statements in paragraph 3 of the plaintiff's affidavit, and Dr. Eadie denied that he made the remark imputed to him in paragraph 5, and further stated that the plaintiff asked him whether her own medical man could see her, to which he answered that he could do so if he would make arrangements with him for that purpose, and that no other application was made by or on behalf of the plaintiff for independent medical advice.

Master Archibald made an order upon the summons staying the action, but upon appeal to Rowlatt J. this order was discharged. The defendant appealed.

Ralph Sutton, for the defendant. The action should be stayed as not being maintainable. The fact that a justice's order was not obtained before the expiration of the first three days did not render the plaintiff's subsequent detention illegal. A justice's order could not have been made under s. 13, for under that section an order is made for detention in an institution for lunatics, and a workhouse is not such an institution. Nor could it have been made under s. 21, sub-s. 1, for in that case the order is to take the alleged lunatic to and receive him in the workhouse, and in the present case the plaintiff was already in the workhouse. There is no section in the Act providing that a justice may order the detention in the workhouse of a person already there. The certificate of the medical officer was a sufficient justification for the detention of the plaintiff in the workhouse after the first three days; it was a valid certificate under s. 24, sub-s. 1, and under s. 24, sub-s. 2, was a sufficient authority for detaining the plaintiff against her will for fourteen days from its date. The fact that no justice's order is required for the fourteen days included in the certificate is shewn by the fact that s. 24, sub-s. 3, provides that no lunatic shall be detained in a workhouse for more than fourteen days from the date of the certificate without the order of a justice. When the certificate was once given by the medical officer, the functions of the defendant, as master of the workhouse, became merely ministerial, and he was bound to detain the plaintiff during the fourteen days, unless the medical officer directed her earlier discharge.

Even assuming that the defendant was not strictly justified in detaining the plaintiff beyond the three days on the medical officer's certificate without an order of a justice, the action ought nevertheless to be stayed under s. 330, as the defendant acted in good faith and with reasonable care. No facts are alleged by the plaintiff in her statement of claim or in her affidavit which go to shew want of good faith or reasonable care on the defendant's part.

F. Newbolt, for the plaintiff. No doubt the defendant was justified in detaining the plaintiff for the three days mentioned in the order of the relieving officer, but he was not justified in detaining her for longer. The proceedings applicable were those contained in s. 13, which provides that information shall be given within three days by the relieving officer to a justice, who may visit the alleged lunatic or direct a medical inquiry, and that the justice may, if he is satisfied, make an order directing that the alleged lunatic be received and detained in an institution for lunatics. In the present case the justice made no order for the further detention of the plaintiff, and it became the duty of the defendant to discharge her on the expiration of the original three days. The certificate of the medical officer under s. 24, sub-s. 1, did not justify the defendant in detaining the plaintiff. That section relates to lunatics in a workhouse, and not to persons deemed to be lunatics who have been brought into the workhouse under the powers conferred by s. 20; and a certificate under that section would justify the detention of a lunatic but not of a person in the position of the plaintiff. The defendant ought to have known that he could not detain the plaintiff merely upon the medical certificate, and he did not under the circumstances act with reasonable care within the meaning of s. 330; it is not suggested that he did not act in good faith.

Ralph Sutton in reply.

VAUGHAN WILLIAMS L.J. To stay an action, to say that an action shall not be tried, is generally to take a step which ought not to be taken except in a very clear case. It not unfrequently arises under the Judicature Act and Rules that there is an application to stay an action, or an application to declare that an action

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is frivolous, and in those cases the practice under the Judicature Act has always been not to stay the action under the general powers of the Judicature Act, because it is a strong thing to say to a plaintiff who is bringing an action that his complaint will not be heard, to say that it will be stayed without there having been a trial, without the evidence having been heard. Generally speaking, the consequence is that the judges are very slow to stay actions; that does not mean that there is no discretion in the judges; but the general practice is that you should not stay actions unless the action, beyond all reasonable doubt, ought not to go on. In other words, you ought not to stay an action unless one of two things occurs: either the action before the Court is what in old days would have been held to be a demurrable claim, or the action is of such a character that, although it may not be demurrable, there is plain reason why it must fail.

In the present case we have this difficulty—that Rowlatt J. came to the conclusion that this action ought to be tried. When one judge thinks that an action ought to be tried, it seems a strong thing for other judges to say that there is clearly no cause of action; especially is that so in a case where the power to stay the action is a discretionary power. The judge who heard the case at chambers exercised his discretion. I have intended to say enough in the observations that I have made to shew that I quite appreciate the full effect that ought to be given to the fact that the learned judge at chambers has come to the conclusion that there is a cause of action here, and that the action ought not to be stayed but ought to go on; and yet I have come to the conclusion that the learned judge is wrong and that there is no cause of action which ought to be allowed to go on.

Observe that this case is not a case under the powers of the Judicature Act and Rules. We are not applying a general Act to some case which happens to fall within its scope. What we are trying here is the question whether this action ought to be stayed having regard to the terms of the Lunacy Act, 1890, s. 330. That is a very different thing, to my mind, to the case of a question under the Judicature Act and Rules whether an action ought to be stayed or not. Here we are dealing with a particular subject-matter, lunacy, and the Act of Parliament

itself states on the face of the Act—I do not so much say "states" as provides for and assumes—that public officers will be employed in carrying out the provisions of this Act of Parliament. The statute, in s. 330, seems to me to be a provision which recognizes in itself the difficulty that may be experienced by the officers in carrying out this Act of Parliament. It is just like the provisions which are made in other statutes which recognize the difficulties which occur when police officers make some mistake in the performance of their duties. There again the law recognizes, to my mind, that the true test is whether the officer is to be placed in a different position, so far as liability is concerned, even though he may have made a mistake as to the terms of the statute, if he honestly has done his best in carrying it out. I am not saying that the policeman is placed in the position in which in my judgment the officers under this Lunacy Act are placed. His position is not precisely the same; still he is protected in a way in which an ordinary citizen would not be protected. A policeman is so protected because he has difficult duties to perform. Now I say here under this Act that the Act recognizes that the officers who are employed to carry it out are placed in a difficult position, and I do not know whether it makes much difference to the conclusions that I have arrived at, that the first sub-section of s. 330 is expressed in the terms that it is; but it is safer always to read the whole of a section, and I am therefore going to read both sub-sections. Sect. 330, sub-s. 1, says: "A person who before the passing of this Act has signed or carried out or done any act with a view to sign or carry out an order purporting to be a reception order, or a medical certificate that a person is of unsound mind, and a person who after the passing of this Act presents a petition for any such order, or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care." That first sub-section states the principle of

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the Act. The principle of the Act is: if the proper officers carrying out the provisions of the Lunacy Act, 1890, have acted in good faith and with reasonable care, even though they have made a mistake, even though the Act of Parliament gave them no jurisdiction in the particular case, and therefore there was what was called the ground of want of jurisdiction, nevertheless they are to be protected. That does not mean, to my mind, protected in the end after there has been an action or the action has been tried; it is a protection which relieves them from liability, in my opinion, before the action has been tried; but if there is any doubt about this, one has to go on and read sub-s. 2. That sub-section says: "If any proceedings are taken against any person for signing or carrying out or doing any act with a view to sign or carry out any such order, report, or certificate, or presenting any such petition as in the preceding sub-section mentioned, or doing anything in pursuance of this Act, such proceedings may, upon summary application to the High Court or a judge thereof, be stayed upon such terms as to costs and otherwise as the Court or judge may think fit, if the Court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care." Now I have already said that, generally speaking, the Court of Appeal does not interfere with the discretion of the judge at chambers, and here the judge at chambers has exercised his discretion by saying that the action may go on; but the discretion, to use an expression of Sir George Jessel, must be a judicial discretion, and in my judgment here the very words of the Act of Parliament limit the discretion which the learned judge is to exercise. He is to exercise such a discretion as will give to the officers and others who are acting under the Lunacy Act the protection the Act of Parliament intended they should have.

Now in this particular case it is admitted there was no bad faith; that means that there was no malice, there was no conscious doing of anything that the officers knew to be wrong or supposed to be wrong; but it is said that there was a want of reasonable care. Let us see what the suggestion of want of reasonable care is. Paragraph 3 of the affidavit of the plaintiff says: "The next day I explained the position to Mr. and Mrs.

Swift. Mrs. Swift said to Mr. Swift, 'This is no place to bring the girl to; she has been tricked—it's just a family dispute; the girl's all right.' I asked if I could see an independent doctor and my solicitor, Mr. Waddington; but Mr. Swift said it was against the rules to call in an outside doctor, and with regard to a lawyer I must see to that after my release." That paragraph is not really relied upon at all. What is relied upon is something which happens later, as said in paragraph 5, "On the 29th July I urged Dr. Eadie very hard to get me let out, as he must see I was not a lunatic. He said, 'If I'd my way, I'd give you your discharge this minute, but I promised Mr. Cryer I would detain you till Monday, the 31st.'" Now actions have been brought against other people than the master of the workhouse. It is possible—I do not wish to say anything, especially as there are actions pending—I do not wish to express any opinion as to what those people who have an action brought against them did—but I say, however that may be, nothing in this paragraph in the slightest degree seems to bear on either want of good faith or of reasonable care.

Under those circumstances, one has to look and see what the facts of this case were. Now the facts were that, whatever the justice of the peace (for there was one who was called in) may have thought or done, it was on his responsibility that the doctor was introduced. The doctor was introduced and he had a duty to perform, and, having that duty to perform, he gave his certificate, which ran thus. It is headed "Certificate as to a Pauper Lunatic in a Workhouse." I think we all came to the conclusion this morning, when we came to look closely into the sections, that the introduction of the word "pauper" there made no sort of difference, since people, who are not strictly paupers, under s. 24 have to be treated as though the actual words were "deemed to be paupers." So I need not trouble myself with that heading. "I, the undersigned medical officer of the workhouse of the above named union, hereby certify that I have carefully examined into the state of health and medical condition of Mary Helen Shackleton, a pauper in the said workhouse, and that she is in my opinion a lunatic and a proper person to be allowed to remain in the workhouse as a lunatic and that the accommodation

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in the workhouse is sufficient for her proper care and treatment separate from the inmates of the workhouse not lunatics (or that her condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that she shall be kept separate). The grounds for my opinion that the said Mary Helen Shackleton is a lunatic are as follows: The patient is excited in manner and speech. For observation." That means that she is to be kept under observation. It is signed "A. W. Eadie." Now in my judgment, although prima facie under s. 20 of the Lunacy Act, 1890, where that applies, the intention is not to detain for more than three days, it was impossible that the master of the workhouse, upon the making of that certificate by the medical man, should have discharged this person mentioned in this certificate—that is, discharged the plaintiff. For myself, I think he would have done very wrong, if he had done so; but, whether or not that conclusion is a right conclusion, one thing I am quite satisfied of now; that is that, if the master did suppose that under that order he was not entitled to discharge this person whom the doctor wants to keep longer for observation, whether or not that was strictly authorized by the words of the Act, it was a conclusion that a man might reasonably and honestly arrive at, at least I hope so, because I think I should have arrived at that conclusion myself. Under those circumstances, in my judgment, without going at further length through the Act of Parliament, I decide this question upon the ground that this Act of Parliament gives special protection to those officers and others acting under the powers of this Act in cases where, although they may have misconstrued the Act and although they may have done things which there was no jurisdiction to do, they have acted in good faith and in a reasonable manner. In my opinion, there is not the faintest evidence in this case that the present defendant, the master of the workhouse, acted with any malice, but with good faith and with reasonable care. I think, as I have already said, it was a matter of very grave consideration when I was differing from the discretion of the learned judge at chambers; still, in my opinion, it would be doing wrong if one were to allow this action to proceed against this defendant, because in my opinion it would

be debarring him from the very protection it was the intention of the Act of Parliament that this man should have, or any man who acted on what he believed to be the powers of the Act in good faith and with reasonable care. Under those circumstances, in my opinion, this action ought not to be allowed to go on.

One small thing I am going to mention. It is not the ground of my decision, but, if the view of this Act taken by the plaintiff's advisers is accurate, obviously there were several defendants, including the relieving officer, possibly also the doctor, who might have been sued much more reasonably than the present defendant, the master of the workhouse. Why the action was pressed forward against this particular defendant I do not know, but the actions against these other defendants are pending and will come to a trial; and under those circumstances it seems to me that, if a wrong has been done to this plaintiff, she will get from the jury an ample recompense from those defendants. Our decision does not deprive the plaintiff here of any remedy from such circumstances as she is entitled to, if she is entitled to any. I think that this appeal ought to be allowed.

KENNEDY L.J. I am of the same opinion. I wish in the first place to express my entire concurrence in the view of my Lord, that one ought to be extremely slow to stop an action before trial, and in the next place I concur equally with him in what he has said with regard to dealing with a question which is a question, as this was, which the learned judge sitting at chambers had to consider as a matter in which he had a discretion. I will only add with regard to the last consideration that one cannot forget that the discretion in this case had been exercised in the first instance by the Master in chambers, and the Master in chambers came to a different conclusion from the learned judge. Master Archibald, when the question came before him, in which he was equally exercising a discretion, was of opinion that this action ought to be stayed, and what we are dealing with is a reversal of the discretion of what I may call the Court of first instance by my brother Rowlatt.

Having said that, what are the facts here? The facts here are that this lady is in this action suing James Swift, the master of

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a workhouse. She is suing him in respect of her detention in that workhouse for a certain number of days. He was the master of the workhouse, and she has sued him. She was brought there under the authority of a relieving officer who, if he was acting bona fide, was certainly entitled to remove her, she being believed by him to be a lunatic dangerous to others as well as to herself. She was brought to the workhouse, and the defendant in this case had no alternative but to receive her as such from him. She was brought under an order which, as it appears to me, in the absence of some action by a magistrate, compelled him to keep her for three days under that order, which was binding upon him; and Mr. Newbolt does not say that there was any wrong done in receiving the plaintiff or in keeping her the three days; but he does say that three days was the limit, and that there was an illegal act on the part of the defendant, the master, as governor of the workhouse, in keeping the plaintiff for the remainder of the period, I think it was nine days, during which she was detained. With regard to that it is said that there was no legal justification. That prima facie, of course, constitutes a sufficient cause of action, but the statute has provided (I presume owing to the difficulties and the delicate responsibilities which it has thrown upon numbers of persons to act in circumstances often of great emergency) in s. 330 that, if the person who is charged with having done something which is illegal can shew that he has in fact acted as in pursuance of the Act,—the words are "has acted in pursuance of the Act in respect of any of the matters therein mentioned and has acted in good faith and can satisfy the judge that there was no reasonable ground for alleging want of good faith or reasonable care"—then under sub-s. 2 of s. 330 he is entitled to have the proceedings stayed. It would be therefore a sufficient ground for that which I think the right course in this case, that, although there may have been something done which on the true construction of the Act cannot be justified under it, yet if it is done by a person under those circumstances, that is to say, acting in pursuance of the Act in circumstances in which there is no reasonable ground for alleging want of good faith or reasonable care, the Court or a judge may, on such terms as to costs and otherwise as the Court or judge may think fit, stay

the action. It is urged by the learned counsel for the respondent to this appeal that in fact what was done in the further period beyond the first three days was not justified by the Act. It is said that the detention cannot be justified unless there was an order expressly made by a justice for the continued detention of the plaintiff in this workhouse. Is that so? There is no doubt that there was a certificate given, which we have, by the medical officer under s. 24; and under that section as I understand it the certificate is to be deemed sufficient authority for detaining the lunatic therein named against his will in the workhouse for fourteen days from its date; it goes on to say that no lunatic shall be detained against his will or allowed to remain in a workhouse for more than fourteen days from the date of a certificate under this section without an order under the hand of a justice having jurisdiction in the place where the workhouse is situate. The facts are that, as I have said, that certificate was given by the medical officer, Dr. Eadie. It was given by him after an interview with the justice, who was there and of course saw the lady herself, as well. Dr. Eadie states (without using the particular words which are said truly to be, so far as they come from the evidence of Dr. Eadie, hearsay) he in fact did not make an order for discharge, but concurred in leaving the patient for further observation; and Dr. Eadie gave the certificate for continuing the detention. I myself, if I had to decide it, am of opinion, in spite of the arguments that have been adduced by the plaintiff, that that certificate was a sufficient justification under the Act for the master to act as he did. I cannot myself think that it is the true view, having regard especially to the language of sub-s. 3, requiring an order under the hand of the justice in cases beyond fourteen days, that the certificate was not intended to be a protection for the detention beyond the three days if given by the medical officer; indeed, the master would have been disobeying the law had he in spite of that certificate loosed this lady from the detention to which she had been originally properly given, there being, as it appears to me, in s. 24 legislation which made the certificate a document in relation to the detention of the plaintiff to which the master of the workhouse was bound to conform. When it is argued that there must be a positive

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order of a justice to detain, I think that that is very difficult to maintain when it is expressly provided in the section that for a detention beyond fourteen days a justice is to make an order. I will assume for a moment that that view is wrong. The object of the Act is to protect people who are trying to do their duty under it although they may not, as I have said, have exactly complied with the regulations. A responsibility was cast upon this workhouse master (it is not suggested that he ever knew anything of this lady or had anything to do with anybody else in regard to her) of receiving her originally, and I think that he acted reasonably and in good faith under the certificate, which was given by the doctor as an authority and a requirement also, in detaining her till further examination, that is, for the period of fourteen days. I think he was entitled to believe that that authority was given properly by the doctor, and that the magistrate, who had seen the lady, and to whom therefore she could have appealed if there was anything wrong, would certainly not have gone away without ordering her discharge if he had not taken the same view, namely, that all that was required was that the doctor should give a certificate requiring her continued detention. Therefore, if he was wrong, it seems to me that the defendant was acting in pursuance of the Act and that there is every reason for us to be satisfied that there is no reasonable ground for the allegation of want of good faith or reasonable care.

Mr. Newbolt told us quite early that he did not allege against the workhouse master a want of good faith. The only thing vaguely suggested against him is that his wife seems to have taken the view that the girl had some case, and that there was the sort of case that she has put forward, but that is not sufficient ground for alleging want of reasonable care. After the medical officer gave his certificate, after the justice had left her in custody after personal examination, in conference with the doctor, and concurred in the desire for there being further observation, was there anything which could be said to be want either of good faith or of reasonable care in acting as the defendant did after what had been done by the doctor and the magistrate? There clearly is, as Mr. Newbolt said, when the affidavits were read,

no reasonable ground for alleging want of good faith, and, as I have said, so far as want of reasonable care is concerned, I see no evidence of it. I think the defendant acted in accordance with the Act of Parliament, but at any rate whether he acted so or not I think that upon the evidence he was not wanting in reasonable care. For these reasons, it seems to me that, while there is a discretion in the word "may," the person who is to be protected by the express provisions such as those contained in s. 330 ought to be protected from the beginning, if it is clear that that which permits the stoppage of the proceedings is established upon the evidence, namely, absence of any ground for charging him with want of good faith or reasonable care.

I think, therefore, with great respect, that my brother Rowlatt was wrong in overruling the Master, who dealt with this in the first instance, and that these proceedings ought to be stayed.

There is an action, we were told, against the relieving officer. Whether there are any proceedings against any of the other parties I do not know, or whether there may be, but I wish to guard myself against being understood to express any opinion as to what may be their rights or what case they respectively could make out; it is sufficient to consider,—it is the only thing we have to consider here,—is there really a case which ought to proceed against James Swift, and I think there is not.

Appeal allowed.

Solicitors for plaintiff: *Stow, Preston & Lyttelton, for J. C. Waddington, Burnley.*

Solicitors for defendant: *Littledale & Lefroy, for Southern, Fullalove & Ritchie, Burnley.*

NOTE.—The Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 13 (1.): "Every constable, relieving officer, and overseer of a parish, who has knowledge that any person within the district or parish of the constable, relieving officer, or overseer, who is not a pauper and not wandering at large, is deemed to be a lunatic and is not under proper care and control, or is cruelly treated or neglected by any relative or other person having the care or charge of him, shall within three days after obtaining such knowledge give information thereof upon oath to a justice being a judicial authority under this Act."

(2.) "Any such justice upon the information on oath of any person whomsoever, that a person within the limits of his jurisdiction, not a pauper and not wandering at large, is deemed to be a lunatic and is not under proper

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care and control, or is cruelly treated or neglected as aforesaid, may himself visit the alleged lunatic, and shall, whether making such visit or not, direct and authorize any two medical practitioners whom he thinks fit to visit and examine the alleged lunatic and to certify their opinion as to his mental state, and the justice shall proceed in the said matter so far as possible, and have as to the alleged lunatic the same powers, as if a petition for a reception order had been presented by the person by whom the information with regard to the alleged lunatic has been sworn."

(3.) "If upon the certificates of the medical practitioners who examine the alleged lunatic, or after such other and further inquiry as the justice thinks necessary, he is satisfied that the alleged lunatic is a lunatic, and is not under proper care and control, or is cruelly treated or neglected by any relative or other person having the care or charge of him, and that he is a proper person to be taken charge of and detained under care and treatment, the justice may, by order direct the lunatic to be received and detained in any institution for lunatics to which, if a pauper, he might be sent under this Act, and the constable, relieving officer, or overseer upon whose information the order has been made, or any constable whom the justice may require so to do, shall forthwith convey the lunatic to the institution named in the order."

Sect. 20: "If a constable, relieving officer, or overseer is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic with regard to whom it is his duty to take any proceedings under this Act, that the alleged lunatic should, before any such proceedings can be taken, be placed under care and control, the constable, relieving officer, or overseer may remove the alleged lunatic to the workhouse of the union in which the alleged lunatic is, and the master of the workhouse shall, unless there is no proper accommodation in the workhouse for the alleged lunatic, receive and relieve, and detain the alleged lunatic therein, but no person shall be so detained for more than three days, and before the expiration of that time the constable, relieving officer, or overseer shall take such proceedings with regard to the alleged lunatic as are required by this Act."

Sect. 21 (1.): "In any case where a summary reception order might be made, any justice, if satisfied that it is expedient for the welfare of the lunatic, or for the public safety, that the lunatic should forthwith be placed under care and control, and if it appears to him that there is proper accommodation for the lunatic in the workhouse of the union in which the lunatic is, may make an order for taking the lunatic to and receiving him in that workhouse."

(2.) "In any case where a summary reception order has been made, an order under this section may be made to provide for the detention of the lunatic until he can be removed."

(3.) "An order under this section shall not authorize the detention of a lunatic in a workhouse for more than fourteen days, after which period such detention shall not be lawful, except in accordance with the provisions of this Act as to the detention of lunatics in workhouses."

(4.) "An order under this section may be made by any justice having jurisdiction in the place where the lunatic is."

Sect. 24 (1.): "Except in the cases mentioned in this Act, no person

shall be allowed to remain in a workhouse as a lunatic unless the medical officer of the workhouse certifies in writing—

"(*a*) that such person is a lunatic, with the grounds for the opinion; and

"(*b*) that he is a proper person to be allowed to remain in a workhouse as a lunatic; and

"(*c*) that the accommodation in the workhouse is sufficient for his proper care and treatment, separate from the inmates of the workhouse not lunatics, unless the medical officer certifies that the lunatic's condition is such that it is not necessary for the convenience of the lunatic or of the other inmates that he should be kept separate."

(2.) "A certificate under this section shall be sufficient authority for detaining the lunatic therein named against his will in the workhouse for fourteen days from its date."

(3.) "No lunatic shall be detained against his will or allowed to remain in a workhouse for more than fourteen days from the date of a certificate under this section without an order under the hand of a justice having jurisdiction in the place where the workhouse is situate."

Sect. 330 (1.): "A person who before the passing of this Act has signed or carried out or done any act with a view to sign or carry out an order purporting to be a reception order, or a medical certificate that a person is of unsound mind, and a person who after the passing of this Act presents a petition for any such order, or signs or carries out or does any act with a view to sign or carry out an order purporting to be a reception order, or any report or certificate purporting to be a report or certificate under this Act, or does anything in pursuance of this Act, shall not be liable to any civil or criminal proceedings whether on the ground of want of jurisdiction or on any other ground if such person has acted in good faith and with reasonable care."

(2.) "If any proceedings are taken against any person for signing or carrying out or doing any act with a view to sign or carry out any such order, report, or certificate, or presenting any such petition as in the preceding sub-section mentioned, or doing anything in pursuance of this Act, such proceedings may, upon summary application to the High Court or a judge thereof, be stayed upon such terms as to costs and otherwise as the Court or judge may think fit, if the Court or judge is satisfied that there is no reasonable ground for alleging want of good faith or reasonable care."

W. J. B.

1912
May 15.

BISHOP AUCKLAND URBAN DISTRICT COUNCIL *v.* ALDERSON.

Local Government — Private Street Works — Provisional Apportionment— Premises fronting, adjoining, or abutting on Street—Premises outside the District of the Urban Authority—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *s.* 6.

A district council has no power under s. 6 of the Private Street Works Act, 1892, to include in the provisional apportionment of the expenses of private street works any premises which, though fronting, adjoining, or abutting on the street, are not within the district of the council.

Special Case stated by quarter sessions for the county of Durham upon an appeal from an order of justices.

Alderson was the owner of property within the area of the Bishop Auckland Urban District Council and was served by the council with notice of a resolution under s. 6 of the Private Street Works Act, 1892 (1), respecting certain works to be done and approving a provisional apportionment whereby Alderson's premises were declared to be chargeable with 159*l.* in respect thereof.

Alderson's property fronted, adjoined, and abutted on the

(1) 55 & 56 Vict. c. 57, s. 6, sub-s. 1: "Where any street or part of a street is not sewered, levelled, paved, ... to the satisfaction of the urban authority, the urban authority may from time to time resolve with respect to such street or part of a street to do any one or more of the following works (in this Act called private street works); . . . . and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street. Any such resolution may include several streets or parts of streets, or may be limited to any part or parts of a street."

Sect. 7: "During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; . . . .

"(*c*) That there has been some material informality, defect, or error in or in respect of the resolution, notice, plans, sections, or estimate;

"(*d*) That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive;

"(*e*) That any premises ought to be excluded from or inserted in the provisional apportionment;"

north side of the street referred to in the notice. The southern boundary of the street formed the southern boundary of the council's area. To the south of that boundary was the area of a rural district. The whole of the works referred to in the notice and resolution were works required to be done in the council's area. The sum of 159*l.* represented the whole of the estimated expenses to be incurred in respect of the works so far as the same were to be executed in the portion of the street upon which Alderson's premises fronted and abutted, and no portion of those expenses was charged upon the premises on the south side of the street which were not within the council's district.

The history of the street and of the adjoining property on the south thereof was as follows. The boundary was originally a hedge, and the property to the south thereof was agricultural land. The owners of that land laid it out for buildings and laid out two streets, called S. Street and M. Street, and two back roads. They did not build up to the northern boundary, but left a space, eighteen feet in width, which became a street running east and west within the rural district. The present proceedings were part of a scheme entered into by the councils of the urban and rural districts with the object of forming a road thirty-six feet in width. The portion within the district of the rural district council had been made up and completed. Part of the street, of the width of thirty-six feet, had already been made up under the Act of 1892 to the west of Alderson's property. That part was partly within and partly outside the council's district.

Alderson contended that the first resolution was bad on the ground that the premises within the rural district, so far as they abutted on the street within the urban district, ought to have been but were not inserted in the provisional apportionment. The quarter sessions disagreed with that contention and held that the said premises were properly excluded from the provisional apportionment.

Alderson also contended that the proposed works were unreasonable, within the meaning of s. 7 (*d*) of the Act. The quarter sessions held upon the facts that the proposed works were not unreasonable in the circumstances.

In the result the quarter sessions disallowed Alderson's

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objections to the proposals of the council on all grounds, thereby reversing the decision of the justices in petty sessions.

The question for the opinion of the Court was whether the determination of the quarter sessions was right.

Manisty, K.C., and *R. I. Simey*, for the appellant. The apportionment of expenses was bad because it did not include all the premises fronting, adjoining, or abutting on the street. The fact that some of the premises are in another district is immaterial to the question whether they are to be included in the apportionment; it is material only upon the question whether they are to be ultimately charged with a portion of the expenses. The language of s. 6 of the Act of 1892 is perfectly clear that the expenses shall be apportioned on the premises, that is all the premises, fronting or abutting on the street; and there is no qualification that the premises must be within the district. In *Herne Bay Urban District Council* v. *Payne* (1) it was decided that all the premises fronting or abutting on the street must be included in the provisional apportionment without regard to the fact that some of them may not be liable to be charged. In that case Lord Alverstone C.J. said: "I think the scheme of this Act is that all the land on both sides of the street is to be included in the provisional apportionment." The case of *Hornsey Corporation* v. *Birkbeck &c. Society* (2) was decided upon s. 150 of the Public Health Act, 1875, and there is a clear distinction between that and the present case; s. 150 says "any street within any urban district," but s. 6 of this Act says "any street" without qualification.

Danckwerts, K.C., and *W. Mackenzie*, for the respondents, were not called on to argue.

LORD ALVERSTONE C.J. The argument for the appellant has been founded upon my judgment in *Herne Bay Urban District Council* v. *Payne* (1) and it is said that I meant to decide in that case that every piece of land which fronts or abuts on a street must be included in the provisional apportionment. I did not intend to decide anything of the kind. The observations which I made were with reference to the facts of that case, and when I

(1) [1907] 2 K. B. 130. (2) [1906] 1 K. B. 521.

pointed out that in the provisional apportionment under the Act of 1892 all the premises abutting on the street were to be included although it might turn out that some of them were not liable to be charged or only liable to be charged at a reduced rate, I did not intend to suggest that premises in another district were to be included in the apportionment. In *Hornsey Corporation* v. *Birkbeck &c. Society* (1) I gave the reasons why premises not within the district could not be included. It seems to me that the respondents could not include in the apportionment any premises in the rural district, and therefore they have included all the premises which they were bound to include. I hold that an apportionment made by an urban council under the Act of 1892 can only include premises within the district of that council. On the first point, therefore, the appellant fails. As to the second point, it was a question of fact whether the proposed works were unreasonable and the justices have found that they were not unreasonable. This appeal must be dismissed.

PICKFORD J. I am of the same opinion. I think that the first point is covered by the principle of the decision in *Hornsey Corporation* v. *Birkbeck &c. Society* (1), although that case was decided under s. 150 of the Public Health Act, 1875, the words of which are not exactly the same as the words of s. 6 of the Act of 1892. With regard to the second point, the question was one of fact for the justices.

AVORY J. I agree. I only wish to add that, apart from the terms of the resolution of the council which I think are quite consistent with the view I am expressing, I think that this was a case of sewering, paving, &c., a part of a street under s. 6 of the Act of 1892, and therefore the expenses were properly apportioned on the premises fronting or abutting on that part of the street.

Appeal dismissed.

Solicitor for Alderson: *H. G. Kenyon, for F. & S. E. Badcock, Bishop Auckland.*

Solicitors for the district council: *Corbin, Greener & Cook, for J. T. Proud & Son, Bishop Auckland.*

(1) [1906] 1 K. B. 521.

J. H. W.

1912
May 3.

HARES *v.* CURTIN.

Education—Public Elementary School—Attendance—Reasonable Excuse for not attending — Distance from School — Measurement — "Nearest Road"— By-law—Elementary Education Act, 1870 (33 & 34 *Vict. c.* 75), *s.* 74.

A by-law of a local education authority provided that it should be a reasonable excuse for a child's not attending school if there was no elementary school within three miles, measured "according to the nearest road," from the child's residence.

The route from a child's residence to a school consisted in part of a cart track which passed through a field forming part of a farm in the occupation of the child's father, and which constituted the approach to the house from the highway. The distance from the house to the school by this route was less than three miles :—

Held, that the word "road" in the by-law was not confined to roads of any particular class and included a cart track of the above description, and that the child was, therefore, not excused from attending the school.

Case stated by justices for Somersetshire.

An information was preferred by the respondent, the school attendance officer acting for and on behalf of the Somerset County Council as the local education authority and by direction of two or more members of the district education sub-committee, against the appellant, George Hares, of Wellington Farm in the parish of Cheddar, charging that the appellant on July 6, 1911, being the parent of a child named Albert Henry Hares, aged 13, did unlawfully neglect to cause the said child to attend school contrary to the by-laws in force in the parish.

Upon the hearing of the information the following facts and documents were proved or admitted :—No. 2 of the by-laws in force in Somersetshire provided that : "The parent of every child of not less than five, nor more than fourteen years of age, shall cause such child to attend school unless there be a reasonable excuse for non-attendance. Any of the following reasons shall be a reasonable excuse, namely :— . . . . (*c*) That there is no elementary school open which the child can attend within three miles measured according to the nearest road from the residence of such child, provided that, when a local education authority provides suitable means of conveyance for a child between a reasonable distance of its home and a public elementary school,

such reason shall not be a reasonable excuse (7 Edw. 7, c. 43, s. 14 (1.)).”

The appellant's child, Albert Henry Hares, who was of the age stated in the information, and resided with the appellant at Wellington Farm, did not attend any school on July 6, 1911. The nearest public elementary school to the appellant's residence was situate at Charterhouse within the said county and was open on July 6, 1911. The local education authority did not on that date provide any suitable means of conveyance for the child between a reasonable distance of its home and any public elementary school.

The ordnance map of the district was exhibited before the justices and on it there were indicated three routes from the appellant's residence to the school, coloured respectively red, blue, and green.

The distance from inside the porch of the appellant's residence to inside the porch of the school was three miles and thirteen and two-thirds yards measured along the red route, as indicated on the map along the north and east sides of the field in the appellant's occupation, No. 422 on the map, to the south-east corner of the field and thence along the centre of the public highway. By taking a direct route from the appellant's residence in the field No. 459 on the map into the field No. 422 there would be a saving in distance of thirteen yards, and by not going into the acute angle in the north-east corner of the field, as shewn by the red line, there would be a saving in distance of eight yards, and a yard could be saved at the gate at the south-east corner of the field by taking the shortest course. This would reduce the total distance by the red route to less than three miles. Inside the gate at the south-east corner of the field No. 422 there were for some distance signs of a roadway, such as wheel tracks and cart tracks, along the east wall of the field, but there were no signs of a made road along the north wall of the field except at one point. A tithe map shewed a road from the gate at the south-east corner of the field No. 422 along the eastern side of the field to a gate at the north-east corner, but did not shew any roadway along the northern side of such field nor across the field by the blue or green routes.

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The distance from the appellant's residence to the school by the blue route through the field No. 422 towards the south-east corner and thence joining the red route along the highway was 317 yards under three miles. This blue route was clearly defined by cart tracks and a distinct sign of a footpath. The distance by the green route in the field No. 422 and thence along the highway was 275 yards under three miles. This green route was clearly defined by cart tracks.

The field No. 422 was formerly an arable field and while under cultivation as such there was no road from the highway to the appellant's residence except by the red route. For seventeen years and upwards the field had been laid down as pasture and had so continued down to and including July 6, 1911. During this period the blue and green routes had been regularly used as approaches to the appellant's residence, the green route being used in bad weather. Neither red, blue, nor green routes were public highways. The child could on July 6, 1911, have walked from his residence to the school at Charterhouse without any detriment to his health.

On behalf of the appellant it was contended that the nearest road within the meaning of the by-laws and of s. 74 of the Elementary Education Act, 1870, was according to the red route indicated on the map, and that measured in this way the distance from the child's residence to the nearest public elementary school exceeded three miles; and that the blue and green routes were not roads within the meaning of the by-law or the Act.

It was contended on behalf of the respondent that both the blue and the green routes were available on July 6, 1911, as roads within the meaning of the by-law for the use of the child; and that the distance by the red route, if not measured along the centre of the track and of the highway, but by the shortest practicable route, did not exceed three miles.

The justices were of opinion and found and determined on the facts proved and admitted that on July 6, 1911, there was a public elementary school open, which the appellant's child could have attended, within three miles measured according to the nearest road from the child's residence, and they accordingly convicted the appellant.

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The question for the opinion of the Court was whether the justices upon the above facts came to a correct determination and decision in point of law.

Sutherland Græme, for the appellant. The word "road" in this by-law and in s. 74 of the Elementary Education Act, 1870, means a defined and recognized way along which traffic can go; it does not include a rough cart track through a field. On the facts found by the justices none of the routes, red, blue, or green, is a road within the by-law. A route is not the same thing as a road.

Simey, for the respondent, was not called upon to argue.

LORD ALVERSTONE C.J. On the facts found by the justices it is impossible to allow this appeal. They have found that for the last seventeen years the routes coloured blue and green on the map have formed the approaches to the appellant's house, and that the distance by either of these routes to the nearest school is under three miles. It is true that these routes are not public highways, but that is immaterial, for in my opinion the word "road" in this by-law is not confined to highways or to roads constructed for the purpose of carrying every class of traffic. It does not mean a road of any particular class, but simply a route from the residence of a child to the nearest school. The justices were therefore right in holding that there was a school within three miles measured according to the nearest road which the child could have attended, and this appeal must be dismissed.

PICKFORD J. I am of the same opinion.

AVORY J. I agree.

Appeal dismissed.

Solicitors for appellant: *Aldridge, Thorn & Sherrington, for H. C. Teek, Axbridge.*

Solicitors for respondent: *Cameron, Kemm & Co., for John Hodge, Weston-super-Mare.*

F. O. R.

1913
April 2.

LLOYD, Appellant *v.* ROSS, Respondent.

Motor Car—Use—Heavy Motor Car—Bridge—Prohibition—Heavy Motor Car (Amendment) Order, 1907, *art.* 14—*Validity—Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36), *ss.* 1, 6—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 12.

Art. 14 of the Heavy Motor Car (Amendment) Order, 1907, which contains regulations as to the use of a heavy motor car on a bridge forming part of a highway, and which purports to have been made by the Local Government Board under the powers conferred by s. 6 of the Locomotives on Highways Act, 1896, and s. 12 of the Motor Car Act, 1903, is not ultra vires the Local Government Board or invalid.

Case stated by Middlesex justices.

At a petty sessions holden at Highgate on July 17, 1912, an information was preferred by the respondent against the appellant, charging that he the appellant being the person driving a heavy motor car did in contravention of the regulations made for the use of heavy motor cars on bridges contained in the Heavy Motor Car Order, 1904, as amended by the Heavy Motor Car (Amendment) Order, 1907 (1), on July 6, 1912, drive the said heavy motor car over the bridge which carries Muswell Hill Road over the Great Northern Railway at Cranley Gardens.

Upon the hearing of the information the following facts were proved:—(1.) That the appellant did, on July 6, 1912, drive a heavy motor car, to wit, a motor omnibus, the property of the London General Omnibus Company, Limited, over the said

(1) Heavy Motor Car (Amendment) Order, 1907, art. 14: "(1.) With respect to the use of a heavy motor car on a bridge forming part of a highway the following regulations, subject to the conditions set forth in subdivision (2.) of this article, shall apply and have effect; that is to say,—

"Where the person who is liable to the repair of the bridge states in a prescribed notice—

"(*a*) that the bridge is insufficient to carry a heavy motor car the registered axle-weight of any axle of which exceeds three tons, or the registered axle-weights of the several axles of which exceed in the aggregate five tons, or any greater weight specified in the notice, ...

the owner of any such motor car shall not cause or suffer the heavy motor car to be driven, and the person driving or in charge of the heavy motor car shall not drive the heavy motor car upon the bridge except with the consent of the person liable to the repair of the bridge."

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bridge. (2.) That at either end of the bridge there was affixed the following notice:—"Motor Car Acts, 1896 and 1903. This bridge is insufficient to carry a heavy motor car the registered axle weight of any axle of which exceeds three tons or the registered axle weights of the several axles of which exceed in the aggregate five tons, or a heavy motor car drawing a trailer if the registered axle weights of the several axles of the heavy motor car and the axle weights of the several axles of the trailer exceed in the aggregate five tons. Great Northern Railway Company, King's Cross Station, London." (3.) That the registered axle weight of the rear axle and the registered axle weights of the several axles of the motor omnibus exceeded those specified in the notice aforesaid in that the registered axle weight of the front axle was two tons and that of the rear axle four tons. (4.) That the notice was affixed by the Great Northern Railway Company, the body liable to the repair of the bridge, in accordance with the Heavy Motor Car Order, 1904, as amended by the Heavy Motor Car (Amendment) Order, 1907, art. 14.

It was contended on behalf of the appellant:—(1.) That art. 14 in the Heavy Motor Car (Amendment) Order, 1907, was ultra vires inasmuch as it delegated to the person liable to the repair of the bridge powers given to the Local Government Board alone, and purported to close a bridge forming part of a highway by the mere affixing of a prescribed notice without inquiry by, or direct authority from, the Local Government Board. (2.) That s. 6 of the Locomotives on Highways Act, 1896, gave no such power of delegation as art. 14 purported to assume. (3.) That the Local Government Board, if the regulation of the user of the bridges was in their hands at all, could alone decide as to the sufficiency or insufficiency of a bridge for the use of heavy motor cars. (4.) That by s. 1, sub-s. 1 (*a*), of the Locomotives on Highways Act, 1896, the user of bridges by heavy motor cars was specifically put under the control of the council of any county or county borough, and that prevention or restriction of user was dependent on such council having satisfied themselves that such user would be attended by damage to the bridge or danger to the public. (5.) That such proviso was unrepealed and in full force, and that the Local

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Government Board in purporting to make the regulations hereinbefore mentioned did so without the authority of Parliament and in excess of the powers conferred on them.

The justices were of opinion that the regulations were good and binding and that s. 1 of the Locomotives on Highways Act, 1896, did not affect their validity. They accordingly convicted the appellant.

The question for the opinion of the Court was whether art. 14 of the Heavy Motor Car Order, 1904, as amended by the Heavy Motor Car (Amendment) Order, 1907, was a valid and binding regulation.

Danckwerts, K.C. (*Ernest Charles* with him), for the appellant. Art. 14 of the Heavy Motor Car (Amendment) Order, 1907, which is alleged to have been infringed by the appellant, purports to have been made by the Local Government Board under the powers conferred by s. 6 of the Locomotives on Highways Act, 1896, and s. 12 of the Motor Car Act, 1903. Sect. 6 of the former Act authorized the making of regulations "with respect to the use of light locomotives on highways," and by s. 12 of the later Act regulations might be made increasing the maximum weights of three tons and four tons mentioned in s. 1 of the Act of 1896, "subject to any conditions as to the use and construction of the vehicle which may be made by the regulations." The word "use" in those sections was intended to apply to matters such as speed and lighting and so forth; the word refers to the use of the vehicle and not to the use of the highway by the vehicle; and the Local Government Board had no power to make the regulation in question, which entirely prohibits heavy motor cars from passing over certain bridges. That is a matter which as regards light locomotives was by s. 1 of the Act of 1896 entrusted to county councils, who are given power to make by-laws "preventing or restricting the use of" light locomotives upon any bridges within their area. A similar power was given to county councils by s. 6 of the Locomotives Act, 1898, with regard to locomotives other than light locomotives. It cannot be supposed that Parliament intended to confer upon two separate and independent bodies, county councils and the Local Government

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Board, power to deal in practically the same way with the same subject-matter. Art. 14 is therefore ultra vires the Local Government Board, and is invalid.

In any case a power to regulate the use of motor cars on highways does not include the power to prevent entirely their use on certain highways, namely, highways over bridges: *Municipal Corporation of City of Toronto* v. *Virgo*. (1) The notice prescribed by art. 14 is also bad because by reason of the reference to an axle weight which exceeds three tons it would apply to a motor car which is under three tons in weight unladen, if the axle weight (which includes the weight of the load) is three and a half tons and more than half a ton of that is due to the weight of the load. Even if the Local Government Board have power to make regulations with regard to the use of bridges by motor cars, there was no power to delegate to the owner of a bridge the power of determining whether the bridge is sufficient to carry a heavy motor car of the specified weight.

Atkin, K.C., and *Bruce Thomas*, for the respondent. Before the passing of the Locomotives on Highways Act, 1896, the right of locomotives to pass over a bridge carrying a highway was regulated by s. 6 of the Locomotive Act, 1861, which enabled the owner of a bridge, or the person liable to repair it, to prevent locomotives from passing over the bridge without their consent by placing a notice on it that the bridge was insufficient to carry weights beyond the ordinary traffic of the district. That enactment was repealed by s. 1 of the Act of 1896 as regards vehicles propelled by mechanical power if under three tons in weight unladen, which are referred to in the Act as light locomotives. The effect of s. 12 of the Act of 1903 and the Heavy Motor Car Order of 1904 was to bring heavy motor cars, the weight of which would be greater than that of light locomotives under the Act of 1896, within s. 1 of that Act, and thus unless some new provision was made they would become exempt from s. 6 of the Act of 1861. The power of county councils to make by-laws as to the use of bridges by light locomotives was not apt to meet the altered state of affairs, for that was a general power, and what was required was power to prevent heavy motor

(1) [1896] A. C. 88.

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cars from passing over a particular bridge which was not strong enough to bear the increased weight. Art. 14 of the Heavy Motor Car Order, 1904 (amended by the Order of 1907), was therefore introduced to meet this difficulty, and the language of s. 12 of the Act of 1903 is wide enough to authorize the making of that regulation, for by that section the Local Government Board were authorized to make regulations increasing the weights mentioned in s. 1 of the Act of 1896 "subject to any conditions as to the use" of the vehicles of increased weight. By art. 14 the Local Government Board have imposed on the use of heavy motor cars the "condition" that they shall not pass over any bridge as to which the formalities required by art. 14 have not been complied with. The fact that county councils were authorized by s. 1 of the Act of 1896 to make by-laws restricting the use of light locomotives on bridges is not conclusive against the Local Government Board having power to deal with the same subject by regulations. A similar dual control exists with regard to locomotives other than light locomotives, for they come within s. 6 of the Act of 1861, and county councils were empowered by s. 6 of the Locomotives Act, 1898, to make by-laws restricting their use on bridges. With regard to the argument that art. 14 might prevent a motor car under three tons in weight unladen from passing over a bridge the answer is that the language of s. 6 of the Act of 1896 is in the same terms as s. 12 of the Act of 1903 and gave the Local Government Board similar power with regard to the light locomotives which came within that Act. [They referred to *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Worcester Corporation.* (1)]

Danckwerts, K.C., replied.

RIDLEY J. In this case I have had considerable difficulty in construing the enactments in question. The question which we have to determine is whether the regulation made by the Local Government Board under which these proceedings were taken is valid or not. The appellant drove a heavy motor car, that is to say a motor omnibus over five tons in weight, over a certain

(1) [1913] 1 K. B. 422.

bridge at the end of which the Great Northern Railway Company had put a notice which was within the terms of art. 14 of the Heavy Motor Car (Amendment) Order, 1907, which Order was in substitution for one which had been in force since December, 1904. The magistrates held that the Local Government Board had power to make that Order, and therefore they convicted the appellant of having driven the vehicle over the bridge.

The matter, as I have said, has presented a great deal of difficulty to my mind. I will first refer to the Locomotives on Highways Act, 1896, which was an Act applying to vehicles under three tons in weight unladen, which were called light locomotives. Sect. 1, sub-s. 1 (*a*), of that Act provides that county councils are to have "power to make by-laws preventing or restricting the use of such locomotives upon any bridge within their area," and under s. 6 power is given to the Local Government Board to "make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used." I am inclined to think that the meaning of that section is that the regulations were to have reference, not to the highways, but to the locomotives, their construction, and the conditions under which they might be used with regard to lights, warnings, and so forth. In 1903 there was further legislation in the Motor Car Act of that year. By s. 12 of that Act, "The Local Government Board by regulations made under section 6 of the principal Act may, as respects any class of vehicle mentioned in the regulations, increase the maximum weights of three tons and four tons mentioned in section 1 of that Act, subject to any conditions as to the use and construction of the vehicle which may be made by the regulations." That means, in the first place, that the Local Government Board might substitute an increased weight for the maximum amounts of three tons and four tons mentioned in s. 1 of the Act of 1896. Oddly enough, there is no limitation to that increased weight, but I suppose it would have to be construed as a reasonable increase in weight. There is nothing in the section which says that there is to be a different regulation as to the way in which the increased weight of the vehicles is to be arrived at, but the Local Government Board,

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as I read s. 12, were to make regulations which would give the Act of 1896 the same operation with regard to vehicles of the increased weight as it had with regard to the original light locomotives. I will now refer to the Locomotive Act, 1861, s. 6 of which provided that the owner or driver of a locomotive was prevented from driving over "any bridge on which a conspicuous notice has been placed by the authority of the surveyor or persons liable to the repair of the bridge, that the bridge is insufficient to carry weights beyond the ordinary traffic of the district, without previously obtaining the consent of the surveyor of the road or bridgemaster under whose charge such bridge shall be for the time being, or of the persons liable to the repair of such bridge." That section was repealed by the Act of 1896 so far as light locomotives were concerned. Therefore, when under the Act of 1903 the weight of light locomotives was allowed to be increased, it would follow that these new vehicles of increased weight, which became known as heavy motor cars, would be light locomotives within the Act of 1896, and would, equally with the original light locomotives, be exempted from the restrictions of s. 6 of the Act of 1861, and therefore the heavy motor cars would be free to pass over a bridge on which a notice under s. 6 of the Act of 1861 was exhibited. It is only in consideration of that effect of these Acts of Parliament that I have been able to come to the conclusion that there was any power to make art. 14 of the Local Government Board's Order. I think that the words in s. 12 of the Act of 1903 "subject to any conditions as to the use and construction of the vehicle which may be made by the regulations" must be read as having reference to the necessity or desirability of maintaining in the case of heavy motor cars the restrictions as to the use of bridges which had existed under s. 6 of the Act of 1861 and which had been repealed as to light locomotives by the Act of 1896, and which in the absence of any regulation would also become repealed as regards heavy motor cars when as a consequence of the Act of 1903 heavy motor cars were brought within the provisions of the Act of 1896. But for that, I should have doubted whether the Local Government Board had any power under these Acts to make regulations dealing with bridges or interfering with the powers

given to county councils by s. 1, sub-s. 1 (*a*), of the Act of 1896. However, for the reasons which I have given, it is, I think, just possible to hold that this regulation is valid, and though I have only come to this conclusion with considerable doubt and difficulty, I am fortified in this view by the fact that my learned brothers agree with it.

This appeal will therefore be dismissed.

PICKFORD J. I am of the same opinion. The question is whether a conviction under what is called the Heavy Motor Car (Amendment) Order, 1907, which is an amendment of the Heavy Motor Car Order, 1904, can be supported. The conviction was with respect to the crossing of a bridge upon which the person responsible for the repair of it had put a notice saying that it was insufficient to carry a motor car above a certain specified weight. The particular vehicle which was driven over the bridge was above that specified weight.

The regulations contained in the Order of 1904 and the amending Order of 1907 purport to have been made under s. 6 of the Locomotives on Highways Act, 1896, called the principal Act, and s. 12 of the Motor Car Act, 1903. At the time of the passing of the Act of 1896 the position with regard to the passing of locomotives over bridges was this: Under the Locomotive Act, 1861, a locomotive could not lawfully be driven over any bridge on which a conspicuous notice had been placed by the authority of the surveyor or persons liable to the repair of the bridge that it was insufficient to carry weights beyond the ordinary traffic of the district unless certain consents were obtained. There was, further, a provision as to what should be done if there was any difference of opinion as to the sufficiency of a bridge to carry weight beyond the ordinary traffic of the district. That was the position up to 1896. In that year an Act was passed called the Locomotives on Highways Act, which removed from the operation of the Act of 1861 locomotives under three tons in weight, referred to as light locomotives, and therefore the owners of bridges, or the persons liable to repair them, were deprived of the protection of the Act of 1861 so far as light locomotives were concerned. It was also provided by s. 1, sub-s. 1 (*a*), of

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the Act of 1896 that county councils should "have power to make by-laws preventing or restricting the use of such locomotives upon any bridge within their area, where such council are satisfied that such use would be attended with damage to the bridge or danger to the public"; and by s. 6 it was provided that the Local Government Board might "make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used." It has been argued that that only refers to the use of the locomotives and not to the conditions of the user of bridges or to the conditions under which the light locomotives might be driven over bridges. I am unable to give so narrow a meaning as that to the words "the use of light locomotives on highways . . . . and the conditions under which they may be used." Highways undoubtedly pass over bridges. Sometimes the bridge is spoken of, not very accurately, as part of the highway, and sometimes it is said that the highway is carried over the bridge; but highways do in fact go over bridges, and bridges do carry highways, and I do not see my way to limit the word "highway" in s. 6 to that part of the highway which is not carried over a bridge. It is also argued that the fact that the county council had power to make by-laws preventing or restricting the use of light locomotives on bridges is inconsistent with a similar power being given to the Local Government Board. I do not myself see the inconsistency, or, at least, I do not see that the inconsistency is such as to prevent me giving what I think is the ordinary meaning to the words. It has been pointed out by Mr. Atkin that the power of the county council is only to be exercised by means of by-laws, and is, therefore, not apt to deal with an emergency where a bridge has become dangerous or ruinous through being shaken by the passing over it of a heavy vehicle. At any rate, the suggested inconsistency does not seem to me to be sufficient to prevent my interpreting the words "the conditions under which a light locomotive may be used on highways" as including a condition that it shall not pass over a bridge which is only fit to carry three tons, if, in fact, the locomotive weighs above five tons. The next Act to which we were referred is that of 1898, which also confers powers upon the county council

to deal with locomotives, but they are not the same kind of locomotives as those which are dealt with by the Act of 1896, and I do not think that that Act throws very much light on the matter. Then in 1903 there was passed the Motor Car Act, 1903, which, in my opinion, has an important bearing on the question before us. Sect. 12 of that Act gives power to "the Local Government Board, by regulations made under section 6 of the principal Act, to increase the maximum weights of three tons and four tons mentioned in section 1 of that Act, subject to any conditions as to the use and construction of the vehicle which may be made by the regulations"; and in effect, therefore, it enables them to write into s. 1 of the Act of 1896 the words "five tons or six tons" instead of "three tons or four tons." The result of doing that is that the heavier vehicle becomes what is called in the Act of 1896 a light locomotive, and subject to the provisions of that Act, and not only does it become a light locomotive, but it ceases to be a heavy locomotive, and therefore it ceases to be within the provisions of s. 6 of the Act of 1861, within which it was until the Local Government Board made the Order increasing the weight of the light locomotives.

Looking at these considerations, it seems to me that the words "subject to any conditions as to the use and construction of the vehicle" must include such conditions as have relation to the increased weight and the use that may be made of the vehicle of the increased weight, and it certainly does not seem unreasonable that the Act of 1903 should have extended the power of the Local Government Board to give the owners of bridges some protection against these vehicles of between three tons and five tons in weight, as to which they would no longer have the protection which they previously had under s. 6 of the Act of 1861. What has been done, as I have already stated, is to make a regulation prohibiting the driving over a bridge of a vehicle above a certain weight if there be a notice that the bridge is insufficient to carry a heavy motor car, the registered axle weight of any axle of which exceeds three tons. It seems to me that that is a regulation dealing with a condition which it was necessary to deal with when the weight of light locomotives was increased, and when the heavy motor cars were removed from the provisions of the Act of 1861. It has

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been objected that this is really a delegation by the Local Government Board of their power of making regulations to the person who has to put up the notice, namely, the person who has to repair the bridge. I do not think it is anything of the kind. It seems to me the power is exercised by the Local Government Board exactly as it was before. I do not see that there could have been any objection if the regulation had provided that, upon information being given by the owner of the bridge or the person liable to repair it to the Local Government Board that it was insufficient to carry above a certain weight, the Local Government Board could restrict the use of the bridge, and it seems to me that this is only a wider and more sensible way of arriving at the same thing. It provides that notice shall be given, not only to the Local Government Board, but also to any one who has to cross the bridge, and therefore it avoids anything in the nature of a trap. I do not think it can be called a delegation of powers; it is an exercise of the power upon information given to the Local Government Board, or to the public through the Local Government Board as one of the public, as to the insufficiency of the bridge.

With regard to the only other point argued, that this might enable the Local Government Board to place restrictions upon the traffic of locomotives which are under three tons in weight, I think that was fairly met by Mr. Atkin pointing out the provisions of s. 6 of the Act of 1896, because, as I have already expressed my view, I think that the words of that section are sufficient to cover regulations of this kind. For these reasons I agree with the judgment of my brother Ridley.

AVORY J. I am of the same opinion. The only difficulty which I have felt in this case is as to the possible conflict between the jurisdiction of the council of the county under s. 1 of the Act of 1896 and the jurisdiction of the Local Government Board in making these regulations. I think it is sufficient to say that when we have a case before us where such jurisdiction is in conflict the Court can deal with it. In this case there is no evidence of any conflict of jurisdiction at all between the two, and we have not even been told that any by-laws have

been made by the county council dealing with this particular bridge.

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I agree with the judgments of my brothers.

Appeal dismissed.

Solicitors for appellant: *Joynson-Hicks, Hunt, Moore & Cardew.*

Solicitor for respondent: *R. Hill Dawe.*

F. O. R.

HOUGHTON, APPELLANT *v.* FEAR BROTHERS, LIMITED, AND WILLSHER, RESPONDENTS.

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April 4.

*Weights and Measures—Coal—Sale and Delivery—Statute containing Temporary and Permanent Provisions—Subsequent Statute continuing whole Act for further Term—Mistake—*1 & 2 *Will.* 4, *c. lxxvi., s.* 52—1 & 2 *Vict. c. ci., s.* 1.

By s. 52 of 1 & 2 Will. 4, c. lxxvi., if a carman or driver of a cart laden with coals for sale or to be delivered to the purchaser thereof within the cities of London and Westminster or within a certain distance thereof shall not have placed in, on, or under his cart a perfect weighing machine, then such carman or driver and the seller of the coals shall be liable to a penalty. Other sections of the Act, suspending the rights of the Corporation of the City of London under certain charters and statutes and instead thereof giving them power to levy a fixed duty upon coals brought into London, were limited to a term of seven years from December 31, 1838. By 1 & 2 Vict. c. ci., after reciting that the term of seven years, during which the provisions of 1 & 2 Will. 4, c. lxxvi., were thereby directed to continue in force, would expire on December 31, 1838, it was enacted that "the said Act and all the . . . . provisions . . . . therein contained . . . . shall be and the same is and are hereby continued for the further term of seven years from December 31, 1838," and all the provisions in the said Act contained to take effect at the end of the term of seven years therein mentioned shall take effect as if the term of fourteen years had been inserted therein instead of the term of seven years.

The Act of William IV., was continued by subsequent Acts down to 1889, when the London coal duties were abolished, and the Act was no longer continued. Upon an information under s. 52 of 1 & 2 Will. 4, c. lxxvi., for delivering coal to a purchaser from a cart without having thereon a perfect weighing machine:—

Held, that the Act, 1 & 2 Vict. c. ci., continuing the Act of William IV.

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for the further term of seven years, and the subsequent continuing Acts, must be read as referring to those sections only of the Act which would have expired if they had not been continued, and not to the whole Act, and that therefore s. 52, which did not require to be continued, was still in force, and that the information was rightly laid under it.

CASE stated by justices for the county of Surrey.

Two informations were laid by the appellant, a county inspector of weights and measures, one against the respondents Fear Brothers, Limited, for causing coal to be delivered to a purchaser from a wagon without having placed in, on, or under such wagon a perfect weighing machine, and the other against the respondent Harold Willsher, their carman in charge of the wagon, for delivering the coal as aforesaid. By consent the two informations were heard together.

The appellant stated that the informations were laid under s. 52 of 1 & 2 Will. 4, c. lxxvi., as amended by s. 5 of 1 & 2 Vict. c. ci. (1), when a question was raised by the Court as to

(1) 1 & 2 Will. 4, c. lxxvi., s. 52: "If any carman or driver of any cart, wagon, or other carriage laden with coals for sale, or to be delivered to the purchaser or purchasers thereof, by any seller or sellers of, or dealer or dealers in, or carrier or carriers of coals from any ship, lighter, barge, or other craft, or from any wharf, warehouse, or other place within the said port of London, or within the cities of London and Westminster, or within the distance of twenty-five miles from the post office aforesaid" (the General Post Office in the city of London), "shall not have placed in, on, or under his cart, wagon, or carriage a perfect weighing machine . . . . then and in every such case every such carman or driver of such cart, wagon, or other carriage not having such machine so placed therein, thereon, or thereunder, shall for every such offence forfeit and pay any sum not exceeding 10*l.*; and the seller or sellers of, or dealer or dealers in, or carrier or carriers of such coals shall forfeit and pay any sum not exceeding 20*l.* . . . ." This provision of the Act was not limited to continue in force for any particular time.

Sect. 60 suspended for the term of seven years from December 31, 1831, the right of the Corporation of the City of London, under various charters and statutes, of measuring and weighing coal brought into the port of London, and of taking fees in connection therewith, and of levying duties upon every ton of coal so imported, and instead thereof imposed a duty of 12*d.* for every ton of coal imported or brought into the port of London; and ss. 61—65 contained provisions mainly consequential upon the suspension of the rights of the Corporation as above, and were also expressly limited to a term of seven years.

1 & 2 Vict. c. ci., entitled "An Act to continue for seven years an Act for regulating the vend and

whether those statutes had not expired. The respondents were not represented by solicitor or counsel.

It was proved that the respondents Fear Brothers, Limited, were coal dealers, and their carman Harold Willsher was delivering coal from a wagon to a purchaser at Weybridge, in the county of Surrey, and within twenty-five miles from the General Post Office, London, without having placed in, on, or under such wagon a proper weighing machine in that, although there was a dead weight machine in the cart, there were no weights, and it was therefore impossible to weigh.

The appellant, by his solicitor, contended :—

(*a*) That the clauses relating to the vending of coal contained in 1 & 2 Will. 4, c. lxxvi., of which s. 52 was one, were not directed to continue in force for any particular period, but were to remain for all time or until repealed.

(*b*) That they had never been repealed expressly or by implication.

(*c*) That the Weights and Measures Act, 1889, whilst giving

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delivery of coals in London and Westminster, and in certain parts of the adjacent counties," after reciting that "the term of seven years, during which the provisions contained in the said Act" 1 & 2 Will. 4, c. lxxvi., "were thereby directed to continue in force, will expire on December 31, 1838, and it is expedient that the same should be continued," enacted in s. 1 that "the said Act, and all the powers, authorities, directions, provisions, penalties, forfeitures, regulations, clauses, matters, and things therein contained (except such of them or such parts thereof respectively as are repealed, altered, or otherwise provided for) shall be and the same is and are hereby continued for the further term of seven years from December 31, 1838; and all the provisions, regulations, clauses, matters, and things in the said Act contained to take effect at the end of the term of seven years therein mentioned, or at any other time or times, shall take effect in the same manner, to all intents and purposes, as if the term of fourteen years had been inserted in the said Act instead of the said term of seven years."

By s. 5, no weighing machine shall be deemed a perfect weighing machine within the meaning of 1 & 2 Will. 4, c. lxxvi., unless proper weights shall be carried therewith.

These Acts were continued by successive Acts, as stated in the preamble to the London Coal Duties Abolition Act, 1889 (52 & 53 Vict. c. 17), until 1889, when by this last-mentioned Act the right of the Corporation to measure and weigh coals imported or brought into London and the right to levy duties thereon were abolished, and the Acts were not further continued.

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power to county authorities to make by-laws dealing with the very offences charged in the present information (1), expressly by s. 33, sub-s. 3, enacted that proceedings may be taken under any other Act providing punishment for such offences.

(*d*) That the only provisions in 1 & 2 Will. 4, c. lxxvi., which were limited in duration were those provisions which related to the measuring of coal by the Corporation and the variation and collection of coal duties and matters incident thereto.

(*e*) That the words contained in 1 & 2 Vict. c. ci., s. 1, specifically enacting that the said Act, 1 & 2 Will. 4, c. lxxvi., was continued for the further term of seven years, were unnecessary and might be treated as surplusage, the last clause of the section effecting all that was required in the only matters that needed continuation.

(*f*) That whilst admittedly the Acts 1 & 2 Will. 4, c. lxxvi., and 1 & 2 Vict. c. ci. had been expressly continued from time to time until 1889, as shewn by the recitals in the London Coal Duties Abolition Act, 1889, and had not been expressly continued after that date, yet the provisions in the Acts relating to the vending of coal had not expired, as they being of a permanent character did not require any continuing legislation.

(*g*) That the Court of Appeal had treated the Acts as being subsisting statutes, as shewn by the case of *Smith* v. *Wood*. (2)

The justices considered that the statute under which the informations were laid, namely, 1 & 2 Will. 4, c. lxxvi., had not been expressly or impliedly repealed, but that s. 1 of 1 & 2 Vict. c. ci. in expressly enacting that the "Act" should be continued for seven years meant and was intended to mean that the Act as a whole became an expiring law requiring continuation, and that it and 1 & 2 Vict. c. ci. were so continued under the style of the

(1) 52 & 53 Vict. c. 21, s. 28: "(1.) Any local authority may from time to time make, revoke, and alter by-laws, ... (*b*) requiring, either generally or in specified classes of cases, a weighing instrument, of a form approved by the local authority, to be carried with any vehicle in which coal is carried for sale or delivery to a purchaser . . . ."

The Surrey County Council made a by-law under that section requiring "the person in charge of every vehicle carrying coal for sale or delivery to a purchaser" to carry therewith a weighing machine of approved form with correct weights.

(2) (1889) 24 Q. B. D 23.

Coal Duties Acts until 1889, when the abolition of the coal duties made it unnecessary to further continue the provisions relating to coal duties, and the Weights and Measures Act, 1889, giving full powers to councils to make by-laws dealing with the vending of coal, made it unnecessary to continue those portions of the Acts which dealt with the vending of coal, and the Acts after being expressly continued until 1889 were not so continued after that date; and they further considered that, as the appeal in the case of *Smith* v. *Wood* (1) was heard on November 19, 1889, it no doubt related to an offence alleged to have been committed before the Acts were said to have expired, and afforded no ground for the argument that the Court of Appeal treated the Acts as subsisting after July 5, 1889. They accordingly held that the Acts 1 & 2 Will. 4, c. lxxvi., and 1 & 2 Vict. c. ci., under which the informations were laid, had expired, and by a majority they dismissed the informations on that ground.

The question was whether in point of law the decision was correct.

Cecil Whiteley, for the appellant. Sect. 52 of 1 & 2 Will. 4, c. lxxvi., is not one of the sections which are limited in their operation to a specified period. Sects. 3—42 vest the Coal Exchange in the Corporation of the City of London and contain various provisions in connection therewith. Sects. 43—59 provide for the selling of coal by weight at any place within the cities of London and Westminster or within twenty-five miles of the General Post Office, London. So far there is nothing in the Act limiting the duration of its provisions. Then come six sections in the Act—ss. 60 to 65—which are expressly limited in their operation to seven years. They deal with an entirely different subject-matter. Those sections suspended the rights which the Corporation of the City of London had under various charters and statutes of measuring and weighing coal brought into London and of taking fees and duties in respect thereof, and imposed a fixed duty upon every ton of coal brought into London, and contained provisions consequential thereon. There are no other sections of the Act which are expressly limited in their operation

(1) 24 Q. B. D. 23.

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to seven years. Therefore when the recital in 1 & 2 Vict. c. ci. stated that the term of seven years, during which the provisions contained in the earlier Act were thereby directed to continue in force, would expire on December 31, 1838, it was inaccurate if it meant that all the provisions of the earlier Act would expire on that date. Sect. 1 adopted that inaccurate view of the earlier Act when it enacted that "the said Act" and all its provisions were continued for a further term of seven years. Sect. 1 must be read as referring only to the provisions in the earlier Act which were expressly limited to seven years, namely, ss. 60—65, and which would have expired on that date unless renewed, and not to the whole Act. In Maxwell on the Interpretation of Statutes, 5th ed., p. 501, it is said that "an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it"; and on pp. 501, 502, *The Prices of Wine* (1) is cited for the proposition that "An Act of Edw. 6, continuing till the end of the then next session an Act of Hen. 8, which was not limited in duration, was considered to be idle in that respect, and not to abrogate it." As appears from the recitals in the London Coal Duties Abolition Act, 1889, the Act 1 & 2 Will. 4, c. lxxvi., was continued for short periods by successive Acts, thus perpetuating the same error, down to 1889, when the right of the Corporation to measure and weigh coal imported into London and to take duties in connection therewith was abolished, and the Act was no longer continued. These continuing Acts, however, must be read as referring only to those provisions of 1 & 2 Will. 4, c. lxxvi., which required renewal. No doubt s. 28 of the Weights and Measures Act, 1889, gives power to the local authority to make by-laws requiring a weighing machine to be carried in a vehicle in which coal is carried for sale or delivery to a purchaser, but that does not shew that s. 52 of 1 & 2 Will. 4, c. lxxvi., is not in operation. The by-law made by the Surrey County Council under that section only makes the person in charge of the cart liable, and therefore the informations here were laid under s. 52 of 1 & 2 Will. 4, c. lxxvi., which is still in force. The justices' decision upon the objection taken was therefore wrong, and the case ought to be remitted to them to be dealt with on the merits.

(1) (1618) Hob. 215.

C. L. Attenborough, for the respondents. The intention of s. 1 of 1 & 2 Vict. c. ci. was that the whole of the Act 1 & 2 Will. 4, c. lxxvi., should continue in operation for a period of seven years from December 31, 1838, and no longer. It is a fair and necessary implication from that enactment that Parliament intended to repeal the earlier Act at the end of seven years from that date. There is a positive enactment of the Legislature that the earlier Act shall only continue in force for a further term of seven years, and the Court has no power to alter that. A recital stands on a different footing from the enacting part of a statute: Maxwell on the Interpretation of Statutes, 5th ed., pp. 506, 507. The Court may, no doubt, disregard the recital in the Act as being an erroneous statement of the provisions of the earlier Act, but it cannot disregard the enacting part of the Act on that ground. Even if there was a mistake in the Act the Court cannot correct it. There is, however, no mistake in the enacting part of the Act, though the recital may not be quite accurate. Under 1 & 2 Will. 4, c. lxxvi., the Corporation had the right of levying a duty upon coal brought into London, and other provisions of the Act gave the consumer in return the privilege of having coal weighed before delivery to him. Parliament intended that the two should co-exist together, and when the duties were taken away by the London Coal Duties Abolition Act, 1889, the whole of the Act 1 & 2 Will. 4, c. lxxvi., was allowed to expire. At the same time Parliament gave the consumer ample protection by the power given to local authorities to make by-laws. It is no objection to say that the by-law made by the Surrey County Council does not affect the seller of the coal, because by s. 5 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), a person who aids, abets, counsels, or procures the commission of any offence punishable on summary conviction is liable to be proceeded against and convicted for the same, and therefore the seller who aids, abets, or procures the commission of an offence against the by-law can be proceeded against. With regard to *Prices of Wine* (1) that was not a decision of a Court and is therefore not binding as an authority. The Courts now look at statutes in a somewhat different light from that

(1) Hob. 215.

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in which the judges in old times regarded them, and take a stricter view of their construction than those judges appear to have done. The decision of the justices was therefore right.

Cecil Whiteley was not called upon to reply.

RIDLEY J. In my opinion the justices arrived at a wrong conclusion when they decided that the Act 1 & 2 Will. 4, c. lxxvi., as a whole had by virtue of 1 & 2 Vict. c. ci. become an expiring law which required continuing from time to time, and that, as it was not continued after 1889, it had then expired. The point seems to me to be a difficult one to decide, and I can quite understand how the justices considered that they were bound to come to that conclusion. It is true that the Act is printed in some of the text-books as being still in force, but it seems to be omitted from others. Therefore it is quite easy to understand how the justices, who had not the same opportunity of so fully considering the matter as we have had, arrived at the conclusion that the Act had expired. In my opinion s. 52 of 1 & 2 Will. 4, c. lxxvi., is still in force. The Act contains provisions of a very varying character. One part of it deals with the selling and delivery of coal to customers in London and Westminster or within a certain distance therefrom, and another part dealt with the rights of the Corporation of the City of London under various charters and statutes to measure and weigh coal brought into London and to charge duties thereon. Sects. 60—65 dealt with the rights of the Corporation in this latter respect, and suspended those rights for a period of seven years from December 31, 1831, substituting in their place the right to levy duties of a certain amount on coal brought into London. Therefore the term of seven years from December 31, 1831, was applicable to those provisions of the Act which suspended the rights of the Corporation under various charters and statutes, and put in their place the right to levy duties under the Act. It seems to have been thought that at the expiration of seven years from that date the duties might be abolished, though in fact they were continued from time to time by successive Acts until 1889, when they were abolished.

The difficulty in this case has arisen from the inaccurate

drafting of the recital and s. 1 of 1 & 2 Vict. c. ci. The Act says that "whereas the term of seven years, during which the provisions contained in the said Act" (1 & 2 Will. 4, c. lxxvi.) "were thereby directed to continue in force, will expire on December 31, 1838, and it is expedient that the same should be continued . . . . Be it therefore enacted . . . . that the said Act, and all the powers, authorities, directions, provisions, penalties, forfeitures, regulations, clauses, matters, and things therein contained (except such of them or such parts thereof respectively as are repealed, altered, or otherwise provided for) shall be and the same is and are hereby continued for the further term of seven years from December 31, 1838; and all the provisions, regulations, clauses, matters, and things in the said Act contained to take effect at the end of the term of seven years therein mentioned, or at any other time or times, shall take effect in the same manner, to all intents and purposes, as if the term of fourteen years had been inserted in the said Act instead of the said term of seven years." In my opinion the section means that, not the whole Act should be continued for the further term of seven years, but only those sections which were originally limited in duration to a term of seven years. The section continued the provisions of the earlier Act for "the further term of seven years," and said that all the provisions of the earlier Act which were to take effect at the end of seven years should take effect "as if the term of fourteen years had been inserted in the said Act instead of the said term of seven years." As was said in *Prices of Wine* (1), it would be idle to speak of a further term when no term was mentioned. It is impossible to apply that to those provisions of the earlier Act which were to continue in force without any limit of time. It would be doing much greater violence to the words of the section if we were to adopt the view taken by the justices that it applied to all the provisions of the earlier Act. It seems to me that the true way out of the difficulty is to say that there is an inaccuracy in the enactment, and that it was only intended to apply to those six sections of the earlier Act which empowered the Corporation to levy duties on coal and which were expressly limited in duration

(1) Hob. 215.

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to seven years. I have therefore come to the conclusion that s. 52 of 1 & 2 Will. 4, c. lxxvi., under which the informations were laid, remains still in force. The case must be remitted to the justices to be heard on its merits.

PICKFORD J. I am of the same opinion. The informations in this case were laid under s. 52 of 1 & 2 Will. 4, c. lxxvi. That section was not limited in its operation to seven years, but was to remain in force so long as it was unrepealed. Other sections in the Act were limited in their operation to seven years, that is to say, they suspended certain powers of the Corporation of London under charters and statutes for a term of seven years, and enacted that those powers should be resumed at the end of that term of seven years. In 1838 the Act of 1 & 2 Vict. c. ci. was passed, which is entitled "An Act to continue for seven years an Act for regulating the vend and delivery of coals in London and Westminster, and in certain parts of the adjacent counties." It recites that "whereas the term of seven years, during which the provisions contained in the said Act were thereby directed to continue in force, will expire on December 31, 1838, and it is expedient that the same should be continued"; and s. 1 proceeded to enact that "the said Act and all the . . . . provisions . . . . therein contained . . . . shall be and the same is and are hereby continued for the further term of seven years from December 31, 1838." That recital was a mistaken one, and therefore the enactment was based upon a mistake. Either it was only intended, as my Lord inclines to think, to apply to those sections of the earlier Act which are limited in their operation to seven years, or, as seems to me perhaps more probable, the draftsman of the Act was under the erroneous impression that the whole Act would expire at the end of the seven years, and acting upon that view he drafted the section so as to continue all the provisions of the earlier Act for a further term of seven years. I do not say that the Legislature might not have continued all the provisions of the Act for seven years with a clear expression of intention that at the end of the seven years the provisions of the Act should cease to operate. If that was so the Court would give effect to it by holding that the Act had ceased to have any

operation. But I do not find any such enactment here. I only find an enactment that the provisions of the Act shall be continued for a further term of seven years. In my opinion that can well be held to have operation in respect of those provisions of the earlier Act which were limited to seven years, and it has no operation so far as regards the permanent provisions of the Act. I find this passage in *Prices of Wine* (1): "Neither can an affirmative continuance of a statute perpetual work an abrogation of the statute." If, therefore, the Act enacts a mere continuance of a former Act perpetual, it does not abrogate that Act. If on the other hand the continuance shews an intention to put an end to the provisions of the earlier Act at the expiration of the specified period, the case would be different. In the present case there is merely a continuance of the earlier Act for seven years, without any intention to abrogate all the provisions of the Act at the end of the seven years.

AVORY J. I am of the same opinion. I should have had more doubt than I have felt had it not been for the word "further" in s. 1 of 1 & 2 Vict. c. ci. If the section had merely said that the provisions of the earlier Act were continued for a term of seven years from December 31, 1838, I should perhaps have felt bound to hold that that was an enactment that those provisions were only to continue in force for that term. But when I find that the provisions are to be continued "for the further term of seven years," and when I see from the recital that it was obviously the intent and object of s. 1 to deal with those provisions of the earlier Act which were limited in their operation to seven years and which would have expired on December 31, 1838, in my opinion the continuance of the Act for the "further term" of seven years must be read as applying only to those provisions of the earlier Act which were limited to seven years. In opposition to this view it is said that the power of the local authority to make by-laws under s. 28 of the Weights and Measures Act, 1889, has now taken the place of the legislation as to the sale and delivery of coal to customers under 1 & 2 Will. 4, c. lxxvi. I notice, however, that by successive

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Acts the Act of 1 & 2 Will. 4, c. lxxvi., was continued down to July 5, 1889, and that by the London Coal Duties Abolition Act, 1889, which came into operation on July 9, 1889, the duties on coal brought into London were abolished as from July 5, 1889, and the Act of 1 & 2 Will. 4, c. lxxvi., was not continued, and the Weights and Measures Act, 1889, did not come into operation until January 1, 1890. Therefore, if the contention of the respondents is right, there was an interval of time during which no provision, either statutory or under by-laws, was in force dealing with this subject-matter. Further, I am not satisfied that the power to make by-laws conferred by s. 28 of the Weights and Measures Act, 1889, covers all of the very useful provisions of 1 & 2 Will. 4, c. lxxvi. It is not necessary to specify them, but it may be that it would not cover the provisions of s. 54. At any rate there is sufficient doubt whether the power to make by-laws is large enough to cover everything dealt with in the Act. The appeal must be allowed.

Appeal allowed and case remitted to justices.

Solicitors for appellant: *Philbrick & Co., for T. W. Weeding, Kingston-upon-Thames.*

Solicitors for respondents: *Horne, Engall & Freeman, Staines.*

W. F. B.

LATHOM, Appellant *v.* SPILLERS & BAKERS, LIMITED, Respondents.

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April 8.

Fertilisers and Feeding Stuffs—Poultry Food—Article artificially prepared—Invoice—Percentages of Oil and Albumenoids—Article prepared by being mixed—Fertilisers and Feeding Stuffs Act, 1906 (6 *Edw.* 7, *c.* 27), *s.* 1, *sub-s.* 2.

By s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906, it is enacted that every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice stating, among other things, the name of the article, and, in the case of any article artificially prepared otherwise than by being mixed broken ground or chopped, what are the respective percentages (if any) of oil and albumenoids contained in the article.

Certain vendors sold for use as poultry food an article composed of certain ingredients, being articles artificially prepared within the meaning of the above enactment, mixed with another ingredient being an article artificially prepared by being broken. The article sold contained both oil and albumenoids :—

Held, that the article sold was an article artificially prepared otherwise than by being mixed broken ground or chopped within the meaning of the enactment, and that the vendors were bound to give to the purchaser an invoice stating the percentages of oil and albumenoids contained in the article.

Case stated by justices of the peace for the Holme Beacon Division of the East Riding of Yorkshire.

On October 21, 1912, an information was preferred by the appellant Thomas Lathom, an official sampler under the Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27) (1),

(1) Fertilisers and Feeding Stuffs Act, 1906 (6 Edw. 7, c. 27), s. 1, sub-s. 2: "Every person who sells for use as food for cattle or poultry any article which has been artificially prepared shall give to the purchaser an invoice stating the name of the article, and whether it has been prepared from one substance or seed or from more than one substance or seed, and in the case of any article artificially prepared otherwise than by being mixed broken ground or chopped, what are the respective percentages (if any) of oil and albumenoids contained in the article, and the invoice shall have effect as a warranty by the seller as to the facts so stated, except that as respects percentages the invoice shall have effect as a warranty only that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error."

Sub-sect. 6: "Where an article sold for use . . . . as food for cattle

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against the respondents, Spillers & Bakers, Limited, poultry food and biscuit manufacturers, for that they on June 11, 1912, on selling for use as food for poultry four hundredweights of Victoria poultry food to one Thomas Green Lyon unlawfully did fail without reasonable excuse to give to the said T. G. Lyon on or before or as soon as possible after the delivery of the said article (such article being an article artificially prepared otherwise than by being mixed broken ground or chopped) the invoice required by the Fertilisers and Feeding Stuffs Act, 1906, stating the respective percentages of oil and albumenoids contained in the said article.

On January 1, 1913, the justices heard and dismissed the information. At the request of the appellant they stated a case in which the following facts appeared:—

On June 11, 1912, the respondents at their branch establishment at Newcastle-on-Tyne sold to T. G. Lyon four hundredweights of Victoria poultry food for use as food for poultry. The invoice sent by the respondents did not state the respective percentages of oil and albumenoids contained in such food. On June 19, 1912, the appellant, the official sampler under the Fertilisers and Feeding Stuffs Act, 1906, duly appointed by the East Riding County Council, visited Mr. Lyon's premises at Market Weighton, having given previous notice to the respondents of his intention so to do, and took a sample of the poultry food in question, which, having been duly analysed in conformity with the procedure prescribed by s. 3 of the Act and with the Regulations of the Board of Agriculture and Fisheries, was found to contain both oil and albumenoids.

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or poultry consists of two or more ingredients which have been mixed at the request of the purchaser, it shall be a sufficient compliance with the provisions of this section with respect to percentages if the invoice contains a statement of percentages with respect to the several ingredients before mixture, and a statement that they have been mixed at the request of the purchaser."

Sect. 6: "(1.) If any person who sells any article for use as . . . . food for cattle or poultry commits any of the following offences, namely:—(*a*) fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act . . . . he shall . . . . be liable, on summary conviction, for a first offence to a fine not exceeding twenty pounds . . . ."

The food was made by taking three substances, namely, (*a*) biscuits made by the respondents by baking a cereal substance generally wheat with water; (*b*) greaves, that is the refuse or sediment left in making tallow or soap grease, purchased by the respondents in the form of large hard blocks varying in weight from two hundredweights to five hundredweights; (*c*) oyster shells, imported by the respondents, having been first broken to a suitable size by the exporters. The biscuits were then, without treatment in any way, broken by the respondents' machinery to the size required, and the greaves, without being previously treated by the respondents in any way, were chopped into small pieces; the broken fragments of biscuit, the small pieces of greaves, and the broken pieces of oyster shells (which latter, after purchase by the respondents, did not undergo any treatment by them) were then mixed together by the respondents' machinery, and the resulting mixture formed the poultry food in question.

The consent of the Board of Agriculture and Fisheries to the institution of proceedings had been duly obtained in compliance with s. 6, sub-s. 3, of the Act.

The appellant contended that the respective percentages of oil and albumenoids contained in the food must be stated on the invoice, if any of the ingredients used in the manufacture of the food were themselves artificially prepared otherwise than by being mixed broken ground or chopped, and that, as at least one of the ingredients of the poultry food in question, to wit, the biscuit, was so artificially prepared as to be within the terms of s. 1, sub-s. 2, of the Fertilisers and Feeding Stuffs Act, 1906, the poultry food must itself be an article artificially prepared otherwise than by being mixed broken ground or chopped.

The respondents contended that the word "article" in s. 1, sub-s. 2, and s. 6, sub-s. 1 (*a*), of the Act meant the article as a whole as distinct from the ingredients from which it was prepared; and that, inasmuch as the poultry food, if artificially prepared at all within the meaning of the Act (which the respondents denied), was at all events not artificially prepared from its ingredients otherwise than by being mixed broken ground or chopped, no offence had been committed, notwithstanding that one or more

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of its ingredients had been individually so prepared as to be within the terms of s. 1, sub-s. 2, of the Act.

The justices were of opinion and found that the poultry food in question was not an article artificially prepared otherwise than by being mixed broken ground or chopped within the meaning of the Act.

The question on which the opinion of the Court was desired was whether the justices came to a correct determination and decision in point of law.

Tindal Atkinson, K.C., and *H. S. Cautley*, for the appellant. The magistrates ought to have convicted the respondents. The plain meaning of s. 1, sub-s. 2, of the Act is that if an article of food for poultry is artificially prepared the invoice must contain the name of the article and a statement whether it is prepared from one or from more than one substance, and that if the article is artificially prepared otherwise than by being mixed broken ground or chopped the invoice must state the percentages (if any) of oil and albumenoids. In the present case the greaves and the biscuit, ingredients of the food, are both artificially prepared otherwise than by being mixed, &c. It follows that the food of which they are component parts is artificially prepared otherwise than by being mixed, &c. Mechanical mixtures of natural products are excepted; but an article artificially prepared otherwise than by being mixed, &c., does not come within the exception merely by being mixed with another article.

C. E. E. Jenkins, K.C., and *Inskip*, for the respondents. The magistrates came to the right decision. This food is not an "article artificially prepared" within the meaning of the enactment. Those words point to a simple article as opposed to a composite article consisting of several ingredients mixed together. The invoice is to state the name of "the article." It is impossible to state the percentages of oil or albumenoids in an article prepared by mechanical mixture. The article must be taken as a whole. If taken as a whole it is prepared by mechanical mixture, it is not within the Act, and the vendor is not bound to resolve it into its component parts.

Counsel for the appellant was not heard in reply.

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RIDLEY J. In this case the justices declined to convict the respondents on an information under the Fertilisers and Feeding Stuffs Act, 1906. The question turns on the meaning of certain words in s. 1, sub-s. 2, of the Act, which are not easy to construe. That enactment provides that in the case of any "article artificially prepared otherwise than by being mixed broken ground or chopped" the invoice is to state the percentages of oil and albumenoids contained in the article. The respondents contend that this poultry food is not an article artificially prepared within the meaning of the enactment, because it is not one article but is a combination of various substances. In my view this contention cannot prevail. It leads to this absurdity, that if the food consisted of greaves or of the biscuit described in the case, it would be an article artificially prepared, but as it consists of the two mixed together with the superaddition of ground oyster shells it ceases to be such an article. I do not think that is the effect of the enactment. In my view the sub-section first deals with articles artificially prepared in the sense of articles in a condition other than as nature made them. In the case of such articles the invoice must state the name of the article in question and whether it has been prepared from one substance or seed or from more than one substance or seed and (except in the cases which I will presently mention) the percentage of oil and albumenoids contained in the article. But certain articles although artificially prepared are to be excepted from the law obliging the manufacturer to state in the invoice the percentage of oil and albumenoids. The excepted articles are articles artificially prepared by being mixed broken ground or chopped, for example oats which have been artificially prepared by being bruised or ground. If it were not for this exception, articles which are artificially prepared by mere mixing or grinding would be within the category of articles artificially prepared and the provision that the percentage of oil and albumenoids must be stated would apply to them. To restrict the scope of the Act the Legislature has excepted from this provision articles which are not artificially prepared otherwise than by being mixed broken ground or chopped. If an article is artificially prepared by other means it falls within the scope of the provision. The article in question is artificially prepared

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otherwise than by being mixed, &c. One of its ingredients has been baked and another has been boiled. This is not a case where articles in their natural condition have been mixed broken ground or chopped, but where several articles have been mixed, two of which have been otherwise artificially prepared. In my opinion the case falls precisely within the terms of the enactment; the magistrates ought to have convicted the respondents, and the appeal must be allowed.

PICKFORD J. I am of the same opinion. The effect of the enactment is that in case of any article artificially prepared the invoice must state the name of the article and the substance of which it is composed. In case of articles artificially prepared otherwise than by being mixed broken ground or chopped the percentage of oil and albumenoids (if any) must be also stated. Does this latter part of the enactment apply to the substance in question? In my opinion it does. I think this part of the section includes an article made up of ingredients some of which are artificially prepared otherwise than by being mixed broken ground or chopped, even though the article is ultimately prepared merely by mixing the ingredients.

AVORY J. I agree. The section as a whole applies to articles artificially prepared. This Act was passed because of a practice of selling for food substances the composition of which was hidden from the purchaser. The object of the Act was to inform the purchaser as to the nature of the substance which he was buying. That being so, it is impossible to give to the enactment the construction for which the respondents contend because that would lead to this absurdity, that if the food consists of a simple substance the nature and properties of which are well known—for example, greaves—then admittedly the invoice must state the percentage of oil and albumenoids; but according to the respondents if the food consists of greaves together with a number of other substances unknown to the purchaser, then the percentages of oil and albumenoids need not be stated. The intention of the Legislature was that in such a case the percentages should be disclosed; and this view is confirmed by

sub-s. 6 of s. 1, which provides that if several substances are mixed by the vendor at the request of the purchaser it shall be a sufficient compliance with the section if the invoice contains a statement of the percentage of oil and albumenoids in the several ingredients before mixture. Therefore if the purchaser should ask for a mixture of greaves and oyster shells the Act prescribes that the invoice shall state the percentage of oil and albumenoids in the greaves. This is to happen where the articles are mixed at the request of the purchaser and where the purchaser knows what the mixture consists of; but according to the contention of the respondents if the articles are mixed by the vendor without the request or knowledge of the purchaser there need be no statement of the percentages. This cannot be the true view. I agree, therefore, that the appeal must be allowed.

Appeal allowed.

Solicitors for appellant: *Bockett, Stunt & Co., for J. R. Procter, Beverley.*

Solicitors for respondents: *Downing & Handcock, Cardiff.*

W. H. G.

1913
April 2.

PLOWRIGHT, Appellant *v.* BURRELL, Respondent.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 25—*Milk—Written Warranty.*

The appellant, being charged under the Sale of Food and Drugs Acts with selling milk that was not of the nature, substance, and quality of the article demanded by the purchaser, proved that the milk had been bought by him from a company under a written agreement and had been sold by him in the same state as when it was purchased. The agreement provided that "the company hereby warrants each and every consignment of milk delivered under this contract to be pure genuine new milk with all its cream according to the conditions of the Food and Drugs Act" and that "no responsibility is taken by the company after delivery other than under the Food and Drugs Act," and that for all other purposes the buyer must satisfy himself at the time of delivery that the milk was pure, and that he should not be entitled to make any claim against the company for damages in respect of milk accepted by him:—

Held, that the agreement constituted a good warranty within s. 25 of the Sale of Food and Drugs Act, 1875, and that the appellant was, therefore, entitled to be discharged from the prosecution.

Wilson v. *Playle* (1903) 88 L. T. 554, followed.

Case stated by a metropolitan magistrate.

A complaint was preferred by the respondent for that the appellant did sell to the prejudice of the purchaser thereof a certain article of food, to wit, milk which was not of the nature, substance, and quality of the article demanded by the purchaser the milk having had 29 per cent. of its original fat abstracted contrary to the provisions of the Sale of Food and Drugs Acts, 1875 to 1907.

The facts alleged in the complaint were proved, and it was further proved that the milk purchased by the respondent and the subject of the proceedings was purchased by the appellant from a company called the Dairy Supply Company, Limited, under the terms of a written agreement, and that it was sold by the appellant in the same state as when it was purchased; and that the appellant had no reason to believe at the time he sold the milk to the respondent that it was otherwise than of the

same nature, substance, and quality as that demanded by the respondent.

The agreement, so far as material, was in the following terms: "The company agrees to supply and the buyer"—the appellant—"agrees to take from the date hereof to March 31, 1913, the whole of the new milk required and sold or used in connection with his dairy business at 107 Kingsdown Road or to wherever it may be removed and amounting to an estimated quantity of sixteen barn gallons daily to be delivered at the above address. The company hereby warrants each and every consignment of milk delivered under this contract to be pure genuine new milk with all its cream according to the conditions of the Food and Drugs Act . . . . The company take great precautions to obtain a supply of pure new milk with all its cream and to deliver the same in that condition to the buyer. It is therefore agreed between both parties that no responsibility is taken by the company after delivery other than under the Food and Drugs Act and that for all other purposes the buyer must satisfy himself at the time of delivery that the milk is sweet, sound and pure, and contains all its cream; and if the milk is accepted by the buyer he shall not be entitled to make any claim for compensation damages or costs upon the company afterwards in respect of any milk which shall have been accepted by him under this contract. For the purpose of the company having immediate particulars when a sample is taken the buyer will in the event of any sample of milk supplied by the company being taken from him for the purpose of analysis under the Sale of Food and Drugs Act immediately deliver at the registered offices of the company, the duplicate sample which the inspector has given to him."

It was admitted that the appellant had accepted the milk from which the sample was subsequently taken by the respondent, and that under the terms of the contract the appellant was not entitled to make any claim for compensation, damages, or costs upon the company in respect of the milk.

It was also admitted that the appellant had complied with s. 20, sub-s. 1, of the Sale of Food and Drugs Act, 1899.

On behalf of the appellant it was contended that the above agreement constituted a written warranty under s. 25 of the

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Sale of Food and Drugs Act, 1875 (1), and that he was entitled to the protection afforded by that section.

On the part of the respondent it was contended that the agreement did not constitute a warranty within s. 25, because the alleged warranty was specially limited to cease at the time of delivery to the appellant, which time was necessarily anterior to the purchase of the sample by the respondent, and as the appellant had accepted the milk, the warranty, if any, had no force or validity at the time of the respondent purchasing the sample from the appellant.

The magistrate was of opinion that the language of the agreement coupled with the fact that the appellant had accepted the milk did so qualify and nullify the alleged warranty as to prevent it being the full and complete warranty contemplated in s. 25 and therefore unavailable as a defence in these proceedings, and he accordingly convicted the appellant.

The question of law for the opinion of the Court was whether the decision of the magistrate was right.

Danckwerts, *K.C.*, and *H. J. Rowlands*, for the appellant. The fact that the agreement provides that if the milk is accepted by the buyer he is to be precluded from making any claim for compensation does not prevent the agreement from constituting a good warranty within s. 25 of the Sale of Food and Drugs Act, 1875: *Wilson* v. *Playle*. (2) The vendor naturally will not guarantee that the milk shall remain pure after delivery, for the purchaser may himself tamper with it. The present case is even stronger than *Wilson* v. *Playle* (2), for here the agreement expressly provides that there shall be a warranty for the purposes of the Act. [*Evans* v. *Weatheritt* (3) was also cited.]

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, ..."

(2) 88 L. T. 554.

(3) [1907] 2 K. B. 80.

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Macmorran, K.C. (*Courthope Munroe* with him), for the respondent. In order to satisfy the requirements of the Act there must be something which is in law a warranty, that is to say, an agreement which in certain events confers certain rights on the buyer. The mere use of the word "guaranteed" or "warranty" is of no avail if in fact the buyer acquires no rights at all. Under this agreement when once the buyer has accepted the milk he has no rights against the vendor, even if the milk was not pure at the time of delivery; the buyer has to satisfy himself at the time of delivery that the milk is pure, but if the milk were really being sold with a warranty there would be no object in requiring the buyer to do that. It does not appear that in *Wilson* v. *Playle* (1) there was any argument as to what are the essentials of a legal warranty. In any case the words of the agreement were not the same as this agreement.

RIDLEY J. The question in this case arises under s. 25 of the Sale of Food and Drugs Act, 1875. The milk in question was proved to have been purchased by the appellant from a company under the terms of a written agreement which contained a clause that "the company hereby warrants each and every consignment of milk delivered under this contract to be pure genuine new milk with all its cream according to the conditions of the Food and Drugs Act." The agreement, however, contained another clause, which provided that "no responsibility is taken by the company after delivery other than under the Food and Drugs Act, and that for all other purposes the buyer must satisfy himself at the time of delivery that the milk is sweet, sound and pure, and contains all its cream; and if the milk is accepted by the buyer he shall not be entitled to make any claim for compensation damages or costs upon the company afterwards." It was contended before the magistrate that this agreement constituted a written warranty under s. 25 and that the appellant was consequently entitled to the protection afforded by that section, but the magistrate was of opinion that the language of the agreement, coupled with the fact that the appellant had accepted the

(1) 88 L. T. 554.

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Ridley J.

milk, so qualified and nullified the alleged warranty as to prevent it being such a warranty as is contemplated by s. 25.

There is no doubt that the complete warranty which is contained in the earlier part of the agreement is considerably qualified by the later clause, and if there had been no authority on the point I think it might have been arguable that when s. 25 of the Act speaks of a warranty it means a warranty good for all purposes, and that an agreement is not a warranty within the Act if the ultimate responsibility of the vendor is entirely excluded and the word "warranty" is only introduced into the agreement for the purpose of affording a defence under the Act.

But in my opinion the present case cannot be distinguished from *Wilson* v. *Playle*. (1) In that case the agreement was that the vendors "agree to sell but without accepting any responsibility after delivery," so that to that extent the language was the same as that of this agreement. The Court held that it was a good warranty within s. 25. Lord Alverstone C.J., referring to the words which I have read, said "whatever effect the words may have in other respects they do not affect this document as a warranty." In the present case the warranty is of greater effect than in *Wilson* v. *Playle* (1) because it refers in terms to the Act, and it is possible that that was done in order to meet the objection that was raised to the warranty in *Wilson* v. *Playle*. (1) But however that may be, I am clearly of opinion that the decision in *Wilson* v. *Playle* (1) covers the question raised by this case, and therefore the appeal must be allowed.

PICKFORD J. I am of the same opinion.

AVORY J. I agree. It is clear from the report of *Wilson* v. *Playle* (1) in the *Law Times* that the contention raised by Mr. Macmorran in this case was present to the minds of the Court in deciding *Wilson* v. *Playle* (1), for it was stated in the argument that "the words introduced do away with the whole effect of the warranty."

Appeal allowed.

Solicitors for appellant: *W. T. Ricketts & Son.*

Solicitor for respondent: *A. M. Bramall.*

(1) 88 L. T. 554.

F. O. R.

PRICE *v.* WEBB.

1913
April 9, 22.

National Insurance—Employed Contributor—Termination of Employment—Duty of Employer to return Insurance Cards—Cards lost in Post—Inability of Insured Person to get Employment owing to Loss of Cards—Claim against Employer for Damages—Remoteness—Agency of Post Office to receive Return of Cards—National Insurance Regulations, May 22, 1912—*Statutory Rules and Orders*, 1912, *No.* 458.

The plaintiff had been in the defendant's employment as a scaffolder, and during the period of such employment he was insured under the National Insurance Act, 1911, his insurance cards being left in the custody of the defendant. By the Regulations made under the Act the employer is required upon the termination of the employment to return any card in his possession to the contributor. Owing to the plaintiff being ill and having to go into hospital his employment by the defendant terminated. Three weeks later the defendant posted the cards to the plaintiff at the address given on them. The cards were lost in the post. On leaving hospital the plaintiff for two weeks failed to get employment in consequence of his inability to produce his cards. On a claim for damages for the two weeks' loss of employment:—

Held, that the claim could not be maintained;

By Ridley and Pickford JJ., upon the ground that, assuming that the defendant had been guilty of a breach of his statutory duty to return the cards, the plaintiff's failure to get employment was not the natural consequence of that breach;

By Avory J., upon the ground that the Post Office was the agent of the Insurance Commissioners, whose property the cards were, to receive the return of the cards, and that the defendant having posted the cards had returned them to the contributor within the meaning of the Regulations.

Case stated by an alderman of the City of London.

A claim was preferred by the respondent, Thomas Webb, against the appellant, Charles Price, under the Employers and Workmen Act, 1875, claiming damages against the appellant for having failed and neglected to return to the respondent a National Health Insurance card and a National Unemployment Insurance card deposited by the respondent with the appellant, the damages claimed being as follows:

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	£	s.	d.
Stamps on National Health Insurance card	0	5	10
Stamps on National Unemployment Insurance card	0	4	2
Loss of wages at 26*s.* weekly for two weeks during which the plaintiff was unable to obtain employment	2	12	0
	£3	2	0

At the hearing the following facts were proved or admitted :—

The respondent was in the employment of the appellant as a scaffolder at 7*d.* per hour wages from August 14, 1912, to September 16, 1912, and during that period was insured by the appellant both for National Health and National Unemployment Insurance in accordance with the requirements of the National Insurance Act, 1911.

During this period the National Health card and the National Unemployment card issued to the respondent under the said Act were with the consent of the respondent and the appellant in the custody of the latter's foreman.

The employment was terminated on September 16, 1912, owing to the illness of the respondent, who on September 18 entered St. Bartholomew's Hospital, where he stayed until October 13, 1912.

From August 14, 1912, to September 14, 1912, the respondent resided at 30, Palmerston Road, Islington, and that was the only address which he had given to the appellant, and that address was on the cards. On September 14 the respondent changed his address from 30, Palmerston Road to 108, Palmerston Road, but he did not inform the appellant or his servants of this fact. On September 13, 1912, the respondent gave notice at a post office (by filling in the usual form of request) for letters to be delivered at the new address, and subsequently had letters redirected in accordance with that request.

On October 9 the appellant's foreman took the cards to the address thereon, namely, 30, Palmerston Road, and was there told that the respondent did not live there. The foreman then took the cards to the appellant's office, and the same day they

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were duly posted at Wormwood Street post office by a clerk in the employ of the appellant in an envelope addressed to the respondent at the first-mentioned address, No. 30, Palmerston Road. They were sent by ordinary post and not by registered post. The respondent never received the cards. They were not returned to the appellant, but were lost in the post.

The respondent never asked the appellant to return the cards until about October 16, when he called at the appellant's office and asked for his cards; he then gave his fresh address, and was told by a clerk that the matter would be seen to. Not hearing from the appellant, the respondent wrote a few days later about the cards, and on October 24 received a reply that the cards had been posted as above on October 9.

The respondent made inquiries at the offices of the Insurance Commissioners and of the Board of Trade, and about October 25 obtained a "temporary emergency card" from the Board of Trade, and on October 28 obtained work from an old employer.

Between October 13 and October 25 the respondent tried to obtain work, but was unable to do so as he could not produce his cards. Two persons declined to employ him on that ground. The appellant never offered to take the respondent back into his service, and the respondent never asked him to do so, nor did he inform the appellant that he was being prejudiced in any way by the loss of the cards.

The cards when lost had insurance stamps affixed to the value of 10*s*. The respondent had not purchased fresh stamps, nor did he satisfy the magistrate that he would ever be called on to do so.

By regulation 5, s. (5.), of the Regulations made by the Joint Committee and the Insurance Commissioners under the National Insurance Act, 1911, dated May 22, 1912, "The employer shall return any" Health Insurance "card in his possession to the contributor . . . . upon the termination of the employment"; and by regulation 5, s. (1.), of the Unemployment Insurance Regulations made by the Board of Trade under the said Act, Statutory Rules and Orders, 1912, No. 458, "On the termination of the employment of any workman for any cause other than his death the employer shall forthwith return the book to the workman."

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The alderman was of opinion

(*a*) that this was a dispute between an employer and workman arising out of or incidental to their relations as such;

(*b*) that under the Regulations of the Insurance Act the employer was required to return the cards;

(*c*) that on the above facts the employer had not returned them within the meaning of the Regulations;

(*d*) that the respondent in consequence had suffered damage by reason of failure to obtain employment, which he assessed at one week's wages, 1*l.* 6*s.*;

(*e*) that the claim for loss of stamps was not substantiated.

The question for the opinion of the Court was whether on the above facts he had come to a correct decision in point of law.

Schloesser, for the appellant. Assuming that the appellant in failing to return the cards to the respondent committed a breach of his statutory duty, the Insurance Act gives no right of action for that breach. Whether a statute gives a right of action for damage resulting from a breach of its provisions must in each case depend upon the object and language of the particular statute: *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1) The damage claimed must be within the mischief aimed at by the Act: *Gorris* v. *Scott.* (2) The object of the Insurance Act was not to prevent unemployment, but to provide a fund to alleviate its effects. With regard to the Health Insurance card it seems clear from ss. 69 and 70 that it was not intended to give any right of action in such a case as this. Sect. 69 renders an employer liable to a penalty if he fails to pay contributions or fails to comply with the Regulations made under the Act. Then s. 70 gives a right of action to the workman for any loss of benefits resulting from the employer's failure to pay contributions, but it says nothing about a civil remedy for breach of the Regulations. The inference is that it was intended that there should be no right of action in the latter case. Secondly, the damage claimed was too remote. The failure of the respondent to get employment was not the natural consequence of the loss of the cards. Thirdly, there was no breach by the appellant of his statutory

(1) (1877) 2 Ex. D. 441. (2) (1874) L. R. 9 Ex. 125.

duty. He did in fact return the cards by delivering them to the Post Office, which was the agent of the Commissioners to receive them and convey them to the respondent. In *Mackinnon* v. *Clark* (1) it was held that a candidate, who had posted a return of his election expenses to the returning officer within the time limited by the Corrupt and Illegal Practices Prevention Act, 1883, had complied with the statutory obligation to "transmit" the return to that officer within the limited period, although the return did not reach the officer until after the period had expired. It is not necessary that the employer should actually deliver the cards into the workman's hand. The notice on the cards that a lost card should be put into a post office letter box indicates that posting is a sufficient return. Fourthly, the magistrate had no jurisdiction to entertain the case. This was not a "dispute under this Act" within s. 4 of the Employers and Workmen Act, 1875. That refers to s. 3, which defines a dispute under the Act to mean a "dispute between an employer and a workman arising out of or incidental to their relation as such." A dispute cannot answer that description except during the continuance of the relation; and here at the time of the default complained of the relation of employer and workman had ceased.

No counsel appeared for the respondent.

Cur. adv. vult.

RIDLEY J. This is an appeal against a decision of an alderman of the City of London on a claim brought by the respondent against the appellant under the Employers and Workmen Act, 1875, to recover damages for loss of employment in consequence of his employer having failed to return to him his insurance cards in accordance with the Regulations made under the National Insurance Act, 1911. The alderman found that he had lost one week's employment owing to the default of the employer and gave him judgment for a week's wages. The question is whether that decision is correct. That question to a large extent turns upon the provisions in the Regulations. With regard to the Health Insurance card, the form of which is set out in Sched. I. to the Health Insurance Regulations, it appears that "This card

(1) [1898] 2 Q. B. 251.

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is the property of the Insurance Commissioners," and under the heading "Lost Card" it is provided that "Any person finding this card, unless he can at once return it to the contributor, should drop it into a post office letter box." With regard to the Unemployment Insurance card, or "book" as it is called in the Regulations, it is similarly provided by regulation 7 of the Unemployment Insurance Regulations that "A book shall be issued without charge to a workman properly applying for a book, and when issued shall remain the property of the Board." Then by s. 69 of the National Insurance Act it is provided that "If any employer . . . . is guilty of any . . . . contravention of or non-compliance with any of the requirements of this Part of this Act"—Part I. dealing with health insurance—"or the Regulations made thereunder . . . . he shall for each offence be liable on summary conviction to a fine not exceeding ten pounds." And by s. 101 there is a corresponding provision imposing penalties for breaches of Part II. of the Act relating to unemployment insurance and the Regulations made thereunder. Under these circumstances it was contended by the appellant in the first place that he did return the cards to the respondent and therefore committed no breach of the Regulations. Secondly it was said that even if he did not return them there could be no right of action in the respondent for the breach of the statutory duty, having regard to the penalties imposed by ss. 69 and 101 and the decision in *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (1) And thirdly it was contended that the damages claimed for loss of employment were too remote. We are all agreed that the appeal should be allowed, but not upon the reasons for our decision. Upon the first point I entertain considerable doubt whether the cards were returned to the respondent within the meaning of the Regulations. In *Retail Dairy Co.* v. *Clarke* (2) it was indeed held that a requirement that a document should be "sent" to a particular person was satisfied by its being put into the post addressed to him; but the word "return" seems to go further and to require that the document should reach the hands of the addressee. It is true that in the case of the Health Insurance card the Post Office is indicated as the

(1) 2 Ex. D. 441. (2) [1912] 2 K. B. 388.

proper medium for the return of a lost card to the owners, but it must be remembered that the owners are the Commissioners, not the contributor, and there is no holding out of the Post Office as a medium for the return of the card to him. Still, though I entertain considerable doubt, I do not decide the point. On the second point, that, there being a remedy by information for a penalty, an action would not lie, reliance, as I have said, was placed on *Atkinson's Case* (1), where it was held that for a breach of the provisions of the Waterworks Clauses Act, 1847, which required the undertakers to keep their fire plugs charged with water at a certain pressure subject to a penalty, no action would lie at the suit of a person whose house was burnt down in consequence of the defendants' neglect to keep the fire plugs properly charged. But in that case Lord Cairns did not lay down any general rule that the mere imposition of a penalty for breach of a statutory duty precluded the existence of a right of action. On the contrary, he said that the question whether a right of action was given or not must in each case "depend on the purview of the Legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works." The present Act seems certainly to be one of general public policy, which the Act then under consideration was not. I am disposed therefore to think that this point could not be maintained, but it is not necessary in my view to decide it, because upon the third point taken, namely, that the damages claimed were too remote, I agree that the action must fail. It appears to me that the loss of employment is not a damage which necessarily or naturally results from the non-return of the respondent's cards. In the case of a Health Insurance card being lost there is a provision in regulation 4, ss. (3.), (6.), for the issue of a new or emergency card, such as was in fact eventually issued in this case. I do not think that the loss of employment in the interval can be claimed as the consequence of the loss of the

(1) 2 Ex. D. 441.

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original cards. A reasonable person would not have required the production of the cards as a condition of giving employment. On this ground I have come to the conclusion that the appeal should be allowed.

PICKFORD J. I am of the same opinion. I do not wish to base my judgment upon the ground that the cards were returned within the meaning of the Regulations. The appellant certainly did not take all the precautions that he might have done. There being a doubt about the respondent's address it would have been more reasonable, if he was going to entrust the cards to the Post Office, to enclose them in a registered letter. Moreover, if, when the respondent went on October 16 to ask about the cards, the appellant's servants had taken the trouble to see what had been done with the cards and had informed him that they had been posted instead of only telling him that the matter would be looked into, he would at once have got an emergency card and no trouble would have arisen. I therefore prefer not to base my judgment on the ground that the putting of the cards into the post amounted to a return of them to the respondent. But I do not think that these damages are recoverable. These cards are the property in the one case of the Insurance Commissioners, in the other of the Board of Trade. The regulations directing the card to be returned to the workman on the termination of the employment are for the benefit of the workman and of the workman alone, and I can see nothing which makes the production of the cards a condition of getting new employment. The only provision which seems to me to bear on that is regulation 3, s. (2.), of the Unemployment Insurance Regulations, which provides that "Every employer on engaging a workman for employment in an insured trade shall, as soon as may be after the date of the engagement . . . . obtain from the workman a book then current." But that does not make it a condition of the employment that the book should be obtained, it is only a direction to the employer to get it as soon as may be after the employment commences in order that it may be properly stamped and the provisions of the Act complied with. There is nothing even so strong as that in the Health Insurance

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Pickford J.

Regulations, and it does not seem to me that, if an employer chooses to refuse employment except upon the terms of the workman producing his card there and then, such refusal is a natural consequence of the non-return of the card by the former employer. I agree that the damages cannot be recovered and that therefore the appeal must be allowed.

AVORY J. I agree that the appeal should be allowed. One question raised in this case which has not been expressly dealt with by my Lord or Pickford J., but with regard to which I believe they agree with me as to how it should be answered, was whether there was a dispute between the employer and the workman "arising out of or incidental to their relation as such" within the meaning of the Employers and Workmen Act, 1875. Under the circumstances of this case it would appear from the decision in *Charles* v. *Mortgagees of Plymouth Works* (1) that there was undoubtedly a dispute within the meaning of the Act notwithstanding that the employment had in fact ceased. On the question whether an action will lie for a breach of the statutory duty to return the insurance cards I feel the same doubt that was expressed by my Lord, and especially having regard to ss. 69 and 70 of the National Insurance Act. The former section makes it a penal offence in an employer to fail to pay the contributions which he is liable to pay in respect of an employed contributor, or to fail to comply with any other requirement of Part I. of the Act or of the Regulations made under it. Sect. 70 expressly provides that civil proceedings may be taken against the employer in respect of the failure to pay contributions, but is silent as to civil proceedings being taken in respect of contraventions of the Regulations. It may well be contended that where there is an express power to bring an action for some breaches of duty, that impliedly excludes any right of action for other breaches. Upon the question on which my Lord and Pickford J. have based their judgment I entertain some doubt. My difficulty arises from the finding of fact in the case that the respondent tried to obtain work but was unable to do so

(1) (1890) 60 L. J. (M.C.) 20.

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Avory J.

as he could not produce his cards. In the face of that finding of fact I feel some difficulty in saying that this damage could not be held to be the consequence of the breach of duty. I base my judgment on the ground that in my opinion the evidence does not establish a breach by the appellant of his statutory duty to return the cards to the respondent. As has already been pointed out, the Health Insurance card is the property of the Insurance Commissioners, it is entrusted to the contributor during its currency, and upon its expiry it is, in the event of the contributor not being a member of an approved society, to be handed in at any post office. In the case of a lost card, any person finding it "unless he can at once return it to the contributor should drop it into a post office letter box," and by regulation 14, s. (5.), "Any employer who is unable to return the card or insurance book of any insured person to him on the termination of the employment shall return the card or book forthwith to the Commissioners." Under these circumstances it appears to me that the Post Office is the agent of the Insurance Commissioners who issue the cards and receive them back. This card was in fact entrusted to that agent for delivery to the contributor, and when once it is found as a fact that it had been properly posted to the last known address and that the Post Office had received notice of the change of address, the default or neglect on the part of the Post Office to deliver the card was the default or neglect of the Commissioners and not of the appellant.

Appeal allowed.

Solicitors for appellant: *Kenneth Brown, Baker, Baker & Co.*

J. F. C.

MONKMAN *v.* STICKNEY.

1913
April 14.

Tramway—Tramcar—By-law requiring Passenger to leave Car by hindermost End—Car standing stationary at Terminus.

A by-law of a corporation provided that passengers on their tramcars should "depart from or get off a car by the hindermost or conductor's platform and not otherwise." The two ends of the cars were identical in construction and form. A passenger on one of the cars on arrival at the terminus of the tramway and while the car was stationary alighted from the end which, while the car was in motion, had been the driver's end. He was summoned for a breach of the by-law:—

Held, that the expression "hindermost or conductor's platform" must in each case be construed in relation to the particular passenger and the journey on which he was engaged, and meant the platform which was or would be the hindermost during the journey which the passenger in question had taken or was about to take; and that an offence had consequently been committed.

Case stated by the stipendiary magistrate for the city of Hull.

The respondent W. H. Stickney was summoned for having whilst a passenger on a tramcar belonging to the Hull Corporation unlawfully got off the car otherwise than by the hindermost or conductor's platform contrary to the by-law in that behalf made by the said corporation pursuant to s. 46 of the Tramways Act, 1870.

At the hearing the following facts were proved or admitted:—

The Hull tramways are owned and worked by the Hull Corporation under the Tramways Orders Confirmation (No. 1) Act, 1896, and certain other local Acts. The mechanical power used is electrical and is that known as the overhead trolley system.

By-laws in respect of the said tramways have been made under their statutory powers by the corporation, and also from time to time by the Board of Trade. At the time of the matters complained of the by-laws in force were as follows:—

The by-law made by the corporation pursuant to which the information was laid provided that "Every passenger shall enter or mount upon or depart from or get off a car by the hindermost or conductor's platform and not otherwise." The by-law

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relating to entrance to and exit from the cars made by the Board of Trade was in the following terms:—"The entrance to and exit from the carriages shall be by the hindermost or conductor's platform except at a terminus when the carriages are stationary." Copies of both by-laws were kept hung up in each car.

The tramcars in use are double-decked tramcars, the ends of each car being identical in construction and form.

The respondent was a passenger travelling in a tramcar on a journey from Victoria Square to the pier, where the car ran to a terminus or dead end. There when the car was at the terminus and stationary and could not proceed further in the direction in which it had previously been moving the respondent alighted from the car from the end which while the car was in motion had been the driver's end.

On arrival at a terminus the practice is as follows. The conductor leaves his platform, taking with him his bundle of tickets, reverses the direction of the trolley pole by means of a long bamboo pole carried on the car, and then takes up his position at the end of the car which had previously been the driver's end. The driver leaves his platform, taking with him his driving lever and sand plug, and takes up his position in what had previously been the conductor's end, though their operations are not necessarily or in fact simultaneous. The car is then ready for the return journey.

The drivers and conductors begin this operation generally immediately after they arrive at the terminus and before all the passengers have alighted, and more particularly so if there is another car close behind them, if the car is behind scheduled time, or if there is a press of passengers waiting to board the car. The passengers for the return journey usually board the car by the end nearest the terminus as soon as the car arrives at a terminus and before it has discharged its then passengers. The car takes up its passengers for, and starts on, its return journey from the exact position at the terminus at which it had been brought to rest on its previous journey.

The magistrate was of opinion that the corporation by-law did not apply to a car when at a terminus and stationary, and alternatively that if it did it was bad for uncertainty. In his

opinion it was impossible for an ordinary passenger to tell when the psychological moment arrived at the terminus when the hindermost or conductor's end was changed. Alternatively he was of opinion that the corporation by-law was bad for the reason that it was in conflict with the Board of Trade by-law and that the latter should prevail. Further he was of opinion that the fact of the two by-laws being exhibited together in the cars was misleading to passengers. He accordingly dismissed the information.

Danckwerts, *K.C.*, and *McCardie*, for the appellant. The magistrate was wrong in holding that the corporation by-law is inconsistent with the Board of Trade by-law. They deal with different subjects. The former is made under s. 46 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), which empowers the promoters to make regulations "for regulating the travelling in or upon any carriage belonging to them," that is to say, in respect of the use of the car. The latter is made under s. 24 of the Tramways Orders Confirmation (No. 1) Act, 1896 (59 & 60 Vict. c. cxx.), which empowers the Board of Trade, in the event of electrical or mechanical power being used upon the tramways, to make by-laws "with regard to the tramways . . . . for regulating the entrance to exit from and accommodation in the carriages used on such tramways and the protection of passengers from the machinery of any engine used for drawing or propelling such carriages." That provision authorizes the Board to make by-laws only in respect of the construction of the car. The Board of Trade has nothing to do with the manner in which the car is used. Consequently the words "entrance to and exit from the carriages" in the Board of Trade by-law mean the physical means of entrance and exit. If, however, that by-law is to be read as referring to the user it is ultra vires and may be disregarded. Taken by itself the corporation by-law is perfectly plain. It is obviously undesirable that at the terminus passengers should be allowed to enter and leave the car at the same end, and the expression "hindermost platform" when applied to a car which is stationary at the terminus must have reference to the particular passenger and the journey with

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which he is concerned; it must mean a different thing according as the passenger has completed his journey or is about to commence one.

H. S. Cautley, for the respondent. It is not correct to say that the Board of Trade by-law refers only to the physical construction of the means of exit. If it did the words "except at a terminus when the carriages are stationary" would be unmeaning, for the construction of a car does not vary according as it is in motion or at rest. The corporation by-law under which the respondent was charged cannot apply to a car which is stationary at the terminus, for there is no precise moment of time at which one can say that the end which was hindermost while the car was in motion has ceased to be such. At the terminus the Board of Trade by-law alone is applicable, and that allows the passenger the option of leaving at either end. At any rate the two by-laws taken together are highly misleading. Both are required to be exhibited inside the cars for the information of the passengers, and if the natural result of a passenger reading them is that he puts a wrong construction on them he ought not to be held responsible.

RIDLEY J. We are of opinion, though one of my brothers entertains some doubt, that the magistrate's decision was not correct, and that the case must be sent back to him with a direction of the Court that he ought to have convicted. The by-law under which the respondent was summoned was one of a group of by-laws made by the Hull Corporation under the powers conferred by s. 46 of the Tramways Act, 1870, and was in these terms: "Every passenger shall enter or mount upon or depart from or get off a car by the hindermost or conductor's platform and not otherwise." It seems to me that where a car, as this one did, runs to and fro between two termini and on arriving at one of them is reversed for the next journey, the intention of the by-law is pretty plain. The driver and conductor change places and the conductor's end becomes that which had been the driver's end. The expression "conductor's platform" in the by-law must have reference to the platform which was the conductor's during the journey which the particular passenger in question

had undertaken. That is the conductor's platform in relation to him, and any passenger of ordinary common sense would so interpret it. Therefore taking that by-law by itself it seems to me incapable of misconstruction, and interpreted as it should be it is equally applicable whether the car is in motion or stationary. But the magistrate has further held in the alternative that the corporation by-law was in conflict with the by-law made by the Board of Trade. That latter by-law provides that "The entrance to and exit from the carriages shall be by the hindermost or conductor's platform except at a terminus when the carriages are stationary." That by-law causes no difficulty when the carriage is in motion, for the exit is to be by the hindermost platform, and it is silent as to what is to happen when the carriage is stationary. As it has therefore no application to the case of a stationary car it cannot possibly be regarded as in conflict with the corporation by-law which does so apply, and the corporation by-law must consequently have effect given to it.

PICKFORD J. I have had and still have some doubts on this matter, but as the other members of the Court entertain a strong opinion I am not prepared to differ.

AVORY J. I agree with the judgment of my Lord. I think the corporation's by-law is quite plain and free from uncertainty. It is perfectly intelligible to any passenger who wishes to understand it. I agree that some difficulty arises from the by-law made by the Board of Trade. But my answer to it is this: that by-law is made under s. 24 of the Tramways Orders Confirmation (No. 1) Act, 1896, which section in my judgment only authorizes by-laws to be made in relation to the physical construction and condition of carriages. If the by-law in question purports to regulate the passenger's use of them I think it may fairly be said to be ultra vires. If it is not ultra vires for that reason I think it is vague and uncertain. It is impossible from reading that by-law to say which end is to be the exit when the carriage is standing at a terminus. Under these circumstances there is I think no ground for saying that the corporation's

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by-law is in conflict with it. A by-law which is certain cannot be repugnant to one which is uncertain.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Town Clerk, Hull.*

Solicitors for respondent: *Stickney & Barton, Hull.*

J. F. C.

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April 14.

HOUSE PROPERTY COMPANY OF LONDON *v.* WHITEMAN.

County Court—Practice—Taxation of Costs—Limitations of Actions and Costs Act, 1842 (5 & 6 *Vict. c.* 97), *s.* 2—*Indemnity as to Costs incurred "in and about any action."*

Where an action is brought in the county court for a matter in respect of which the plaintiff, if successful, is entitled under the Limitations of Actions and Costs Act, 1842, to receive a "full and reasonable indemnity as to all costs, charges, and expenses incurred in and about any action," the plaintiff's costs, so far as they are incurred "in the action," ought to be taxed according to the county court scale; but the plaintiff is further entitled, under the indemnity against costs incurred "about the action," to recover all costs reasonably incurred by him as preliminary to the action, including the costs of taking counsel's opinion as to whether the action would lie.

APPEAL from the Clerkenwell County Court.

The action was brought in the county court under 2 Will. & Mar. sess. 1, c. 5, for pound breach. That Act by s. 4 provided that "upon any pound breach or rescous of goods or chattels distrained for rent the person or persons grieved thereby shall, in a special action upon the case for the wrong thereby sustained, recover his and their treble damages and costs of suit against the offender or offenders."

That provision, so far as it gave a successful plaintiff treble costs, was repealed by the Limitations of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97), which by s. 2 provided that in lieu thereof the plaintiff should "receive such full and reasonable indemnity as to all costs, charges, and expenses incurred in and

about any action, suit, or other legal proceeding, as shall be taxed by the proper officer in that behalf."

The plaintiffs recovered judgment for a sum of 44*l.* 9*s.* 6*d.*, being treble the value of the goods improperly removed by the defendant, and also for an indemnity as to costs.

On taxation the registrar taxed the plaintiffs' costs according to the county court scale, refusing to allow any item not authorized by that scale. Amongst the items disallowed by the registrar were the costs of taking counsel's opinion before action brought as to whether there was a good cause of action. On an application to the judge to review the taxation the judge held that the case must go back to the registrar with a direction that, as the county court scale did not provide such full and reasonable indemnity as the plaintiffs were entitled to under the 5 & 6 Vict. c. 97, the registrar ought not to tax upon that scale, but that he was at liberty to look at the High Court scale as a guide in arriving at what a reasonable indemnity would be. The defendant appealed.

Arthur Powell, K.C., and *Merlin*, for the defendant. The registrar was right in taxing the costs on the county court scale. What the plaintiffs are entitled to is an indemnity against the costs which they are liable to pay to their solicitor. Therefore the question is what costs incurred in and about the action are they liable to pay as between solicitor and client? That is determined by the County Courts Act, 1888. By s. 118 of that Act, "All costs and charges between solicitor and client shall . . . . be taxed by the registrar of the Court in which such costs and charges were incurred . . . . and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force, unless the registrar shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed"; and similar provisions are embodied in Order LIII., rr. 1 and 20. The scale which is in the appendix to the Act—Part IV.—is headed "Higher Scale—Costs to be paid to solicitors in actions and matters, as well between party and party as between solicitor and client, where the subject-matter or the sum recovered exceeds 10*l.*" Except so far as there is an

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agreement in writing to pay costs not included in the scale a solicitor can recover no more from his client than can be recovered as between party and party, there being only one scale and no distinction being drawn between the two classes of taxation. There was no evidence before the registrar that the instructions to the solicitor to take counsel's opinion before action were in writing, and the costs of taking such opinion are not allowed by the scale. In *Tory* v. *Dorchester Corporation* (1) it was held that, where in an action in a county court against a public authority a judgment is obtained by the defendant, the costs which under the Public Authorities Protection Act, 1893, are "to be taxed as between solicitor and client" must be taxed on the county court scale. The fact that the indemnity allowed by the Act of 1842 includes costs incurred "about the action" as well as those incurred "in the action" do not permit the recovery of any costs not mentioned in the scale. The words "about the action" are satisfied by supposing them to refer to the one "letter before action" which the scale allows.

Stuart Bevan, for the plaintiffs. The county court scale has no application to the indemnity against costs given by the Limitations of Actions and Costs Act, 1842. The sums which are the subject of such indemnity are not, strictly speaking, costs at all, but are part of the statutory remedy for the wrong complained of: per Wills J., *Reeve* v. *Gibson*. (2) The case of *Tory* v. *Dorchester Corporation* (1) is not in point, for the Public Authorities Protection Act does not employ the term indemnity; it simply says that the costs are to be taxed as between solicitor and client. Then if the county court scale does not apply to the case the judge was right in directing the registrar to look at the High Court scale, not as binding on him, but as a guide as to what was reasonable. The costs of taking counsel's opinion as to whether the action would lie are covered by the expression "costs incurred about the action."

Arthur Powell, K.C., in reply.

CHANNELL J. I am of opinion that we must allow this appeal in part, and the case must go back to the registrar

(1) [1907] 1 K. B. 393. (2) [1891] 1 Q. B. 652.

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Channell J.

for the purpose of having the costs taxed upon the proper principle. The order of the judge which is appealed from indeed remitted the case to the registrar, but the principle upon which the judge directed him to tax is in my opinion in some respects incorrect. I will state what I consider the correct principle to be. The action being one which fell within the Limitations of Actions and Costs Act, 1842, the plaintiff was entitled, in lieu of the treble costs given by the statute of William and Mary, to a "full and reasonable indemnity as to all costs, charges, and expenses incurred in and about" the action. What the plaintiff is to get is an indemnity, which implies that he cannot recover from his opponent more than he is liable to pay to his own solicitor. What then is he liable to pay to his own solicitor? It is to be observed that the costs to which the indemnity relates are costs "in and about" the action. So far as costs "in the action" are concerned they are dealt with by s. 118 of the County Courts Act, 1888, which provides that as between solicitor and client "no costs or charges shall be allowed on . . . . taxation which are not sanctioned by the scale then in force" except so far as the client has agreed in writing to pay them. That scale is headed "Costs to be paid to solicitors in actions and matters as well between party and party as between solicitor and client where the subject-matter or the sum recovered exceeds 10*l*." Therefore so far as the costs here to be taxed were costs in the action I think the county court judge was wrong in saying that the county court scale did not apply. But the indemnity, as I have said, covers costs incurred "about the action" as well as costs incurred "in the action"; and the word "about" must refer to something not included in the word "in." Here the plaintiff had a grievance in respect of the seizure of goods which he had impounded. It was one which was not of the ordinary class, and before bringing his action he consulted his solicitor. The solicitor advised taking counsel's opinion, but whether he took the precaution of getting his client's instructions to take that opinion in writing there was no evidence to shew. I will assume that he did not get his instructions in writing and that they were oral only. I think the plaintiff would be equally liable to his solicitor for the costs of

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that opinion. It cannot be that if counsel advised that there was no cause of action at all the client would have to pay, but that if counsel advised that there was a cause of action and that the action should be brought in the county court he would not. Is then this a charge which, though the solicitor could recover it from his client, is not within the indemnity? I think not. The indemnity must be held to include all charges which are reasonably incurred in connection with, though preliminary to, the action which is ultimately brought.

LORD COLERIDGE J. In such an action as this the plaintiff if successful is entitled under the Limitations of Actions and Costs Act, 1842, to an indemnity in respect of all costs "incurred in and about" the action. Subsequently to that Act came the County Courts Act, 1888, which says that on taxation of costs between solicitor and client no costs shall be allowed which are not sanctioned by the scale then in force, unless the client has agreed in writing to pay them. But the prohibition against the solicitor receiving more costs from his client than the scale allows is limited to costs incurred in the action, for the scale, as its heading indicates, is only a scale of costs "in actions and matters." The indemnity on the other hand which is given by the Act of 1842 is not confined to costs incurred in the action, it extends to costs incurred "about" the action. Under that head I think it would include costs incurred as preliminary to the action such as those of taking counsel's opinion whether the action could be maintained.

Appeal allowed.

Solicitor for appellant: *A. G. Lewis.*

Solicitors for respondents: *McKenna & Co.*

J. F. C.

HOWE *v.* BOTWOOD.

1913
April 11.

Landlord and Tenant — Lease — Covenant by Lessee to pay "Outgoings" — Covenant by Lessor to keep the Exterior of the Premises in repair—Notice by Sanitary Authority to reconstruct outside Drain—Liability of Lessee.

A lease of a dwelling-house contained a covenant by the lessee to "pay and discharge all rates, taxes, assessments, charges, and outgoings whatsoever which now are or during the said term shall be imposed or charged on the premises or the landlord or tenant in respect thereof (land tax and landlord's property tax only excepted)." The lessor covenanted to "keep the exterior of the said dwelling-house and buildings in repair." The sanitary authority served notice during the term on the lessor under the Public Health Act, 1875, stating that a nuisance existed on the premises arising from an outside defective drain and requiring him to do certain work which involved the renewal and reconstruction of the drainage system outside the house; and an order of justices was made directing him to do the work. The lessor accordingly did the work required, and claimed to recover from the lessee the cost thereof so far as it exceeded mere repair:—

Held, that the lessee's covenant to pay "all outgoings imposed on the landlord in respect of the premises" must be read as being subject to the performance by the lessor of his covenant to keep the exterior of the buildings in repair, and that, as the work of renewal and reconstruction was necessary in order to enable the lessor to perform his covenant to repair, he was bound to bear the cost thereof.

Stockdale v. *Ascherberg* [1904] 1 K. B. 447, distinguished.

Appeal from the Ipswich County Court.

The action was brought by the plaintiff to recover the sum of 23*l.* 7*s.* 5*d.* in the following circumstances. By an indenture of lease dated March 3, 1911, the plaintiff demised to the defendant a dwelling-house and garden at Ipswich for the term of five years from March 25, 1911, at the yearly rent of 40*l.* By the lease the defendant covenanted to "pay and discharge all rates, taxes, assessments, charges, and outgoings whatsoever which now are or during the said term shall be imposed or charged on the premises or the landlord or tenant in respect thereof (land tax and landlord's property tax only excepted)," and he also covenanted to keep the interior of the premises during the term in as good repair and condition as the same were then in, and at the determination of the term to deliver up possession of

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the premises in such repair and condition, fair wear and tear and damage by fire excepted. The plaintiff as lessor covenanted as follows: "That the lessor will keep the exterior of the said dwelling-house and buildings in repair, but the lessor shall not be liable to make good any want of repair in respect of damage done to the said premises by the lessee, his agents or servants, or due to his or their negligence."

In the early part of 1912 the defendant complained to the plaintiff of the state of the drains, and in June, 1912, the inspector of nuisances at the request of the defendant tested the drains and found that they were defective. Correspondence passed between the parties as to executing the necessary work, and on August 15, 1912, the urban sanitary authority served notice upon the plaintiff under the provisions of the Public Health Acts stating that a nuisance existed on the premises arising from a defective drain, and requiring him to abate it within twenty-one days, and for that purpose to execute certain works, which amounted to a renewal and reconstruction of the drains, such as taking out the defective drain and laying a suitable glazed stoneware drain, providing inspection chambers, and carrying up the soil pipe. The work required to be executed was in connection with the drains outside the house. On September 12, 1912, an order was made by a Court of summary jurisdiction directing the plaintiff forthwith to abate the nuisance in compliance with the requisitions of the above notice and to do all such works as were necessary for that purpose. The plaintiff accordingly executed the work required by the notice, and brought this action to recover from the defendant the sum of 23*l.* 7*s.* 5*d.* as being the amount expended upon the work of renewal and reconstruction of the drains as distinguished from the work of repair. At the trial the inspector of nuisances gave evidence to the effect that the old drain was past repair.

The county court judge gave judgment for the defendant. The plaintiff appealed.

Henlé, for the plaintiff. This is an "outgoing" within the meaning of the defendant's covenant to pay and discharge all outgoings whatsoever imposed or charged on the premises or the

landlord in respect thereof: *Stockdale* v. *Ascherberg.* (1) The work which the plaintiff was directed by the order to do amounted to a reconstruction of the drainage system, and he has not included in the sum of 23*l.* 7*s.* 5*d.* now sought to be recovered any part of the expense incurred in repairs properly so called to the outside drains, and therefore the plaintiff's covenant to repair does not affect the question. The defendant is therefore liable.

C. E. Jones, for the defendant. In *Stockdale* v. *Ascherberg* (1) there was no agreement by the landlord, as there is in this case, to keep the exterior of the dwelling-house and buildings in repair. The work which the plaintiff was ordered to do was work upon the outside drains and came within the terms of the plaintiff's covenant to repair. The outside drains having become out of repair, and the work of repair necessitating the reconstruction of the drains, the covenant applies. The work is none the less work of "repair" within the meaning of the covenant because it involves the reconstruction of the drains. The reconstruction work was incidental to the repairs. The decision of the county court judge was therefore right. [*Lurcott* v. *Wakely* (2) was referred to.]

Henlé in reply. The sum which the plaintiff seeks to recover in this action was not expended in "repair." It was expended in reconstruction, and the fact that the sanitary authority required the drains to be reconstructed did not make it work of repair.

CHANNELL J. This case raises a somewhat novel point. The lease of this house contains a covenant which no sensible tenant for a short term would ever agree to, and it has been interpreted by the Court of Appeal in *Stockdale* v. *Ascherberg* (1) in a manner unfavourable to the tenant. We are bound by that interpretation of the covenant. There is also a covenant by the landlord to keep the exterior of the premises in repair, and this stipulation was not in the agreement which the Court had to construe in *Stockdale* v. *Ascherberg.* (1) We must construe those two covenants so as to make them consistent with each other.

Now the tenant has covenanted to "pay and discharge all

(1) [1904] 1 K. B. 447. (2) [1911] 1 K. B. 905.

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rates, taxes, assessments, charges, and outgoings whatsoever which now are or during the said term shall be imposed or charged on the premises or the landlord or tenant in respect thereof." The decision in *Stockdale* v. *Ascherberg* (1) shews that a charge such as that imposed upon the plaintiff in the present case, namely, an obligation to lay a new drain, construct inspection chambers, and carry up the soil pipe, comes within the defendant's covenant to pay and discharge all "outgoings" imposed on the landlord in respect of the premises. If that covenant had stood alone it would have imposed upon the defendant the burden of making the payment. There is, however, in this case in addition a covenant by the plaintiff to keep the exterior of the dwelling-house and buildings in repair. Without doubt the drains in question are part of the buildings and are outside the dwelling-house; and they are in fact out of repair. The plaintiff under his covenant had to keep them in repair, and as the drains were out of repair he had to repair them. The law, however, did not allow him to do the repairs to the drains unless he fulfilled certain requirements of the sanitary authority which were in the nature of improvements upon the then existing drainage system. Suppose that a drain was laid in mortar, and the law required, when the landlord came to repair it, that it should be laid in concrete, it is clear that the landlord would have to lay it in concrete, the only way in which the law would allow him to effect the necessary repairs. The law only allowed him to repair the drains upon the terms of his constructing inspection chambers and carrying up the soil pipe, and therefore he became unable to perform his covenant to repair without executing work which was in the nature of improvements to the drainage system. It is like the case of the wall in *Lurcott* v. *Wakely* (2), which was so out of repair that it could not have been repaired without being rebuilt, and the tenant was held liable, under his covenant to repair, to pay the cost of taking down and rebuilding the wall. If it was impossible to repair the drains without effecting improvements to the drainage system, the plaintiff would have to effect the improvements in order to perform his obligation under his covenant to repair. The law gives the sanitary authority the right, where a

(1) [1904] 1 K. B. 447. (2) [1911] 1 K. B. 905.

nuisance exists, to require by notice certain work to be executed which may be in the nature of improvements, and to apply to a Court of summary jurisdiction to enforce the requirements of the notice. The expense of executing the work would under this covenant fall on the plaintiff. If therefore that covenant by the plaintiff had stood alone without the covenant by the defendant, that is how I should construe it. That covenant, however, has to be read with the earlier covenant by the tenant to pay and discharge all outgoings. There are thus two covenants, one placing the burden on the tenant and the other placing it on the landlord. We must construe the lease as a whole so as to make it consistent in both its parts. In my opinion the covenant by the tenant must be read as if it contained the words "except such as are by this lease imposed upon the landlord." By reading that exception into the covenant by the tenant the two covenants can be read together. If it were not so read in, the cost of ordinary repairs to the outside drains might come within the tenant's covenant. We are justified in so reading the two covenants, and accordingly, notwithstanding the decision in *Stockdale* v. *Ascherberg* (1), where there was no such covenant by the landlord as there is in this case, the expense falls upon the plaintiff. The decision of the county court judge was right, and the appeal must be dismissed.

LORD COLERIDGE J. I am of the same opinion. There are two apparently conflicting covenants, one by the landlord to keep the exterior of the dwelling-house and buildings in repair, which includes the outside drain, and the other by the tenant to pay and discharge all outgoings imposed or charged on the landlord in respect of the premises. The question is which of those two covenants is to override the other.

In the first place it is quite clear from the authorities that the landlord's covenant to repair includes renewals and replacements so far as they are necessary for the work of repair. That is clear from the decision in *Lurcott* v. *Wakely* (2), which followed the law as laid down for a long time. The bare fact therefore that there have been renewals and replacements in respect of the

(1) [1904] 1 K. B. 447. (2) [1911] 1 K. B. 905.

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drains does not necessarily prevent them from coming within the category of repairs. On the other hand it has been held in *Stockdale* v. *Ascherberg* (1) that an imposition by the local authority upon the landlord in respect of the premises comes within the word "outgoings" in an agreement for a lease containing a stipulation similar to the covenant by the tenant in the present case. Therefore if this latter covenant had stood alone, this burden would have fallen on the tenant. In my opinion, if it was physically impossible to execute the work of repair without making these renewals and replacements, then the expense thereof falls upon the landlord under his covenant. I can draw no distinction between what is physically necessary and what is legally necessary to enable the landlord to perform his covenant; and if it was legally necessary to execute the repairs in the way in which they were executed, the cost of doing those repairs which were legally necessary for the performance of the landlord's covenant to repair is cast upon the landlord.

The question therefore comes to this. The landlord having undertaken to do the work, is the burden which he has so undertaken by implication transferred to the shoulders of the tenant by virtue of his covenant? For the reasons given by my Lord I am of opinion that it is not. The covenant by the tenant must be read as being subject to the performance by the landlord of his covenant. The landlord has not performed his covenant, and the extra work imposed by the order of justices has been primarily rendered necessary by the breach of his covenant by the landlord. If his covenant had been performed the work would not have been necessary. The appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Field, Roscoe & Co., for Birkett, Ridley & Francis, Ipswich.*

Solicitors for defendant: *Elvy, Robb & Welch, for Turner, Turner & Martin, Ipswich.*

(1) [1904] 1 K. B. 447.

W. F. B.

DENNIS & SONS, LIMITED *v.* CORK STEAMSHIP COMPANY, LIMITED AND OTHERS.

1913
April 25.

[1913 D. 979.]

Ship—Bill of Lading—Freight payable before Delivery—Goods placed by Shipowner in Warehouse to be held for him—No Notice given of Lien for Freight—Right of Consignee to Delivery upon Deposit of Freight with Warehouseman—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 493—496.

Goods were shipped at Antwerp for Southampton under a bill of lading which provided that the shipowner should have a lien for freight, which was to be paid "at destination before delivery," that the goods should be taken from alongside by the consignee as soon as the vessel was ready to discharge, and that otherwise they might be "landed, put into lighters, or stored by the steamer's agent . . . . at the expense of the consignee."

The steamer arrived and was ready to discharge, but the consignee did not take delivery or pay the freight. The shipowners placed the goods in a warehouse with written instructions to the warehouseman to hold them for the shipowners and not to deliver them to any one without their written instructions accompanied by their release for freight.

The indorsees of the bill of lading sent it to the warehouseman with the amount due for freight and asked for delivery of the goods, pursuant to s. 495, sub-s. 2, of the Merchant Shipping Act, 1894, but delivery was refused upon the instructions of the shipowners:—

Held, that the shipowners had not placed the goods in the warehouse under the provisions of ss. 493—496 of the Merchant Shipping Act, 1894, and that therefore the owners of the goods were not entitled to delivery upon depositing the amount of the freight with the warehouseman under the provisions of sub-s. 2 of s. 495.

ACTION tried before Scrutton J., without a jury, as a commercial cause.

The defendants, the Cork Steamship Company, were the owners of the steamer *Harelda*. The plaintiffs were the indorsees of a bill of lading for potatoes shipped at Antwerp on the *Harelda* for delivery at Southampton.

The bill of lading provided: "The company shall have a lien upon the goods for the payment thereof, as well as a general lien, not only for the freight of the same but for all other freights arrears of freights storage or charges owing to the company by

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the shipper consignee or owners"; "Freight . . . . for the said goods to be paid at destination before delivery"; "The goods to be taken from alongside by the consignees as soon as the vessel is ready to discharge and to receive the same as fast as the vessel can discharge . . . . or otherwise they may be landed, put into lighters, or stored by the steamer's agents or at the agents' option may be taken possession of by the man appointed by the agents in either case at the expense of the consignee of the goods and at his risk of fire loss or injury."

The *Harelda* arrived at Southampton and was ready to discharge, but the plaintiffs failed to take delivery of the goods and did not pay or tender the freight due. The master thereupon, under the instructions of the steamer's agents, landed the goods and placed them in a warehouse belonging to the defendants the London and South Western Railway Company, who were the proprietors of the dock. The steamer's agents had given written instructions to the railway company that "all goods landed from the Cork Company's steamers at Southampton on captain's entry are so landed for ship's purposes and you are not authorised to deliver goods so landed unless and until we give you on the captain's or shipowners' behalf notice in writing so to do. You will understand that goods so landed are held by you for the captain and shipowners and you are not at liberty to deliver them to any person whatever without our instructions as agents for the ship and that such instructions should in all cases, unless there is a definite statement to the contrary, be accompanied by our release for the freight."

The plaintiffs sent to the railway company the bill of lading for the goods together with a cheque for the amount due for freight, which they stated that they deposited under ss. 494—496 of the Merchant Shipping Act, 1894 (1), and asked for

(1) 57 & 58 Vict. c. 60:—

Sect. 493: "(1.) Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or, having made entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally herein-after mentioned, the shipowner may make entry of and land or unship the goods at the following times:—

"(*a*) If a time for the delivery of the goods is expressed in the charterparty, bill of

delivery of the goods. The railway company refused delivery because the agents of the steamer refused to release the goods.

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DENNIS & SONS, LIMITED v. CORK STEAMSHIP COMPANY, LIMITED.

lading, or agreement, then at any time after the time so expressed:

"(b) If no time for the delivery of the goods is expressed in the charterparty, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, from the time of the report of the ship.

"(2.) Where a shipowner lands goods in pursuance of this section he shall place them, or cause them to be placed:—

"(a) if any wharf or warehouse is named in the charterparty, bill of lading, or agreement, as the wharf or warehouse where the goods are to be placed and if they can be conveniently there received, on that wharf or in that warehouse; and

"(b) in any other case on some wharf or in some warehouse on or in which goods of a like nature are usually placed; the wharf or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the Commissioners of Customs for the landing of dutiable goods."

Sect. 494: "If at the time when any goods are landed from any ship, and placed in the custody of any person as a wharfinger or warehouseman, the shipowner gives to the wharfinger or warehouseman notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him."

Sect. 495: "The said lien for freight and other charges shall be discharged:—

"(1.) upon the production to the wharfinger or warehouseman of a receipt for the amount claimed as due, and delivery to the wharfinger or warehouseman of a copy thereof or of a release of freight from the shipowner, and

"(2.) upon the deposit by the owner of the goods with the wharfinger or warehouseman of a sum of money equal in amount to the sum claimed as aforesaid by the shipowner;

but in the latter case the lien shall be discharged without prejudice to any other remedy which the shipowner may have for the recovery of the freight."

Sect. 496: "(1.) When a deposit as aforesaid is made with the wharfinger or warehouseman, the person making the same may, within fifteen days after making it, give to the wharfinger or warehouseman notice in writing to retain it, stating in the notice the sums, if any, which he

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The plaintiffs then brought this action against the shipowners and the railway company to establish their right to delivery of the goods upon payment of the freight to the warehousemen, the railway company, under the provisions of the Act, and to recover damages. By agreement an order was made that the goods should be delivered to the plaintiffs, the amount of freight paid to a joint account, and the railway company dismissed from the action. The action then proceeded against the shipowners alone.

F. D. Mackinnon, for the plaintiffs. The shipowners placed these goods in a warehouse subject to the instructions given to the warehouseman that they were not to be delivered to any one without their "release for freight." That must mean that the warehouseman was to hold the goods subject to the shipowners' lien for freight. That is a deposit of the goods under the provisions of the Merchant Shipping Act, 1894, and the consignee then has the right to deposit the amount claimed for freight and have the goods delivered to him under s. 495, sub-s. 2, of the Act. If the goods were not delivered to the warehouseman subject to a lien for freight, the consignee could demand delivery of his goods at once and the warehouseman would have no answer to his claim. In *White & Co.* v. *Furness, Withy & Co.* (1) Lord Herschell L.C. said: "It is quite true that in some cases he might only obtain the sum due to him after a delay greater than would have been involved if he had not warehoused the goods, and that section of the Act had not come into operation. But the Act imposes upon him no obligation to warehouse them. It is merely an empowering enactment of which he need not take advantage." That shews that the shipowner may or may not, at his option, exercise the power given to him by the Act, but that if he does exercise that power the provisions in favour of the consignee apply. As Lord Macnaghten said in that case (2),

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admits to be payable to the shipowner, or, as the case may be, that he does not admit any sum to be so payable, but if no such notice is given, the wharfinger or warehouseman may, at the expiration of the fifteen days, pay the sum deposited over to the shipowner."

(1) [1895] A. C. 40, 47.

(2) [1895] A. C. 55.

"it is a mistake to suppose that this part of the Act was passed simply for the benefit of the shipowner." The provision contained in the bill of lading that the shipowner may land the goods and place them in a warehouse cannot have the effect of depriving the owner of the goods of the advantage given to him by s. 495, sub-s. 2, of the Act. The terms of a bill of lading may sometimes override the terms of the Act, for instance, under s. 493, and there are authorities to that effect; but there is no decision that such a clause as is contained in this bill of lading can do so in such a case as this. In *White & Co.* v. *Furness, Withy & Co.* (1) there was a similar clause in the bill of lading, but it was not suggested that it enabled the shipowner to say that the provisions of the Act did not apply. [He referred to *Meyerstein* v. *Barber.* (2)]

Adair Roche, K.C., and *R. A. Wright*, for the defendants. The railway company, as warehousemen, held these goods for the shipowners upon the terms of the instructions given to them by the shipowners, and did not hold them under the provisions of the Merchant Shipping Act, 1894. The plaintiffs are really seeking to vary the terms of the contract contained in the bill of lading and to get delivery of the goods before instead of after payment to the shipowners. This is not a case of shipowner's lien at all, but of mutual concurrent conditions by the express terms of the contract. There is no lien where the freight is to be paid at any other time than on delivery of the goods: *Meyerstein* v. *Barber.* (2) *Wilson* v. *London, &c. Steam Navigation Co.* (3) shews that the warehouseman was the agent for the shipowners, and that the obligation of the consignees was to pay the freight to him as agent for the shipowners and not under the Act. These goods were not placed in the warehouse subject to any lien for freight, and the notice specified in s. 494 of the Act was not given by the shipowners to the warehouseman.

F. D. Mackinnon in reply. There is no express provision in the bill of lading that delivery of the goods is only to be made after payment of the freight. The provision is only that payment is to be made before delivery, instead of the usual payment

(1) [1895] A. C. 40. (2) (1866) L. R. 2 C. P. 38.
(3) (1865) L. R. 1 C. P. 61.

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against delivery, and that cannot so alter the whole character of the contract that there is no lien for freight but only a condition precedent that there shall be no delivery until after payment. If the shipowner does the very thing which is described in the provisions of the Act, he is acting under those provisions and cannot say that he is not.

SCRUTTON J. This case raises a question of some difficulty and importance between owners of goods carried on a steamer and a company, the steamship owners.

The point in dispute is this: The plaintiffs are indorsees of a bill of lading for potatoes, freight to be paid before delivery, with a lien for freight and a general lien "for all other freights, arrears of freights, storage, or charges, owing to the company by the shipper, consignee, or owners"; and there is this provision: "The goods to be taken from alongside by the consignees as soon as the vessel is ready to discharge . . . . otherwise they may be landed, put into lighters, or stored by the steamer's agents . . . . at the expense of the consignee of the goods." The steamer arrived at Southampton and was ready to discharge. The owners of the goods broke their contract, they did not take delivery and they did not pay freight. A writ could have been issued against them at that moment for the freight, and judgment under Order XIV. with costs could have been obtained against them. But, for the convenience of their own business, they desired to substitute for payment of freight before delivery (delivery being as soon as the vessel was ready to discharge) another arrangement by which delivery should be when they chose to take it from a warehouse, and freight should be paid when they had examined the goods and satisfied themselves that there were no claims to be made. They desired in effect to substitute that for the payment of freight before delivery.

This controversy seems to have arisen from the goods' owners taking this course of action during December and January. In February the shipowners wrote to the warehouseman saying that any goods landed with him were landed "for ship's purposes," and he must not deliver them to any one without the shipowners' instructions, and that such instructions must be accompanied by

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their release for the freight; that is, "Any goods we land to you you hold for us to deliver to our instructions." Then the ship arrived, but the consignees had not given any instructions to take delivery. Thereupon the goods were landed and stored in the warehouse under the general notice, with no notice of a lien for freight for any amount.

The shipowners declined to permit delivery of the goods from the warehouse unless all freight was paid to them. The consignees objected and said, "The landing is under the Merchant Shipping Act, and we are entitled to the goods when we deposit the money with the warehouseman on the terms of ss. 495 and 496." The shipowners said, "You have no right to take advantage of those clauses. We have not landed under the Act." A provisional arrangement was made by which the goods were released and the money put in joint names, and the warehouse keepers, the London and South Western Railway Company, were dismissed from the action; and the shipowners and the goods' owners are now fighting as to who was right in the construction of the Act.

It seems quite clear, upon the clauses of the bill of lading, first of all that the ship might keep the goods on board until the freight was paid, and that the consignee could not complain; secondly, that the ship might put the goods into lighters and keep them there until the freight was paid, and the consignee could not complain; and thirdly, I agree, though I had some doubt about it at first, with the defendants' argument that if without reference to lien the consignee came and demanded delivery of the goods, the ship could say that it was a condition of delivery that the freight should be paid first and that the goods would not be delivered until the freight was paid.

The remaining question is this: If, instead of putting the goods into lighters, the shipowner stores them, saying to the warehouse keeper that he does not take them under the Merchant Shipping Act but holds for the shipowner, is he in the same position as if he had put the goods into lighters or kept them in the ship? I think that he is. I think that, if he deals with the matter in that way, he can say that he will not deliver unless he is paid the freight. Sect. 493 of the Merchant Shipping Act.

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after stating the power of the shipowner to land (sub-s. 1), says (sub-s. 2), "Where a shipowner lands goods in pursuance of this section," words which clearly contemplate that he may be landing goods for some other reason. I am inclined to think, although it is not necessary to decide it, that s. 494 only applies to cases under s. 493; but, if that is not so, it only applies to cases where the goods are stored with a notice that they are to remain subject to a lien for freight "to an amount mentioned in the notice." It appears to me not to apply to a case where they are stored with the warehouseman with a notice not to deliver to anybody without instructions, saying nothing about the amount of freight, but leaving the shipowner to settle all questions as to freight.

That, I think, exhausts the questions between the parties. I hold that the shipowner did not store the goods under the Merchant Shipping Act, and that the goods' owner had therefore no right to get the goods by depositing money with the warehouseman, but had only a right to get the goods by fulfilling his contract to pay the shipowner before delivery, and that the plaintiffs' claim therefore fails.

Judgment for defendants.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendants: *Cattarns & Cattarns.*

J. H. W.

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April 3, 4.

Local Government — Offensive Trade — Order of Local Authority declaring Trade offensive — Business established before Order — Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 112 — *Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 51.

By s. 112 of the Public Health Act, 1875, "Any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of" (then follow six specified trades) "or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty not exceeding 50*l.* in respect of the establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding 40*s.* for every day on which the offence is continued." By s. 51 of the Public Health Acts Amendment Act, 1907, "The words 'any other trade, business, or manufacture which the local authority declare by order confirmed by the Local Government Board, and published in such manner as the Board direct, to be an offensive trade,' shall be substituted for the words 'any other noxious or offensive trade, business, or manufacture,' in section 112 of the Public Health Act, 1875":—

Held, that it is not an offence to carry on a business (not being one of the six offensive trades specified in the section) which has been declared by order of the local authority to be an offensive trade, where the business was established before the coming into operation of the order declaring it to be an offensive trade.

CASE stated by justices for the county of Gloucester.

A complaint was made by the respondent, town clerk of the borough of Cheltenham, acting as clerk to the urban authority of the said borough, under s. 112 of the Public Health Act, 1875, as amended by s. 51 of the Public Health Acts Amendment Act, 1907 (1), against the appellants for that they unlawfully

(1) 38 & 39 Vict. c. 55, s. 112: "Any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of—

"Blood boiler, or
"Bone boiler, or
"Fellmonger, or
"Soap boiler, or
"Tallow melter, or
"Tripe boiler, or
"Any other noxious or offensive trade, business, or manufacture,

shall be liable to a penalty not exceeding 50*l.* in respect of the

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did on June 12, 1912, carry on at the Nag's Head yard, in the borough of Cheltenham, the business of dealers in raw hides and skins, which business was by an order made by the urban authority and confirmed by the Local Government Board on May 17, 1912, declared to be an offensive trade, and that the said business had been established since the passing of the Public Health Act, 1875, without the consent of the urban authority and had been continued down to the date of the complaint.

Upon the hearing of the complaint the following facts were admitted or proved:—By an order made by the Local Government Board and dated September 7, 1909, s. 51 of the Public Health Acts Amendment Act, 1907, was declared to be in force in the borough of Cheltenham on and after October 26, 1909.

By an order dated May 17, 1912, the Local Government Board confirmed an order made by the urban authority of the borough of Cheltenham and dated April 1, 1912, whereby the trade of a dealer in raw hides and skins within the said borough was declared to be an offensive trade. The order of the Local Government Board was duly advertised and a statement of the effect thereof was duly published in the *London Gazette* as thereby directed.

The appellants were established in 1844, and carried on the business of dealers in raw hides and skins at their principal place of business at Birmingham, and at Shrewsbury and other places. On December 8, 1911, since the passing of the Public

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establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding 40*s.* for every day on which the offence is continued, whether there has or has not been any conviction in respect of the establishment thereof."

7 Edw. 7, c. 53, s. 51: "(1.) The words 'any other trade, business, or manufacture which the local authority declare by order confirmed by the Local Government Board, and published in such manner as the Board direct, to be an offensive trade,' shall be substituted for the words 'any other noxious or offensive trade, business, or manufacture,' in section 112 of the Public Health Act, 1875.

"(2.) The local authority may make by-laws with respect to any trade which is an offensive trade under section 112 of the Public Health Act, 1875, as amended by this Act, whether established before or after the commencement of this Act, in order to prevent or diminish any noxious or injurious effects of the trade."

Health Act, 1875, but before the making and confirmation of the order declaring the trade of a dealer in raw hides and skins within the borough of Cheltenham to be an offensive trade, the appellants, without the knowledge or consent in writing or otherwise of the urban authority, established and commenced to carry on the business of dealers in raw hides and skins at the Nag's Head yard, of which they were tenants at a weekly rent of 5*s*., within the said borough, and there continued without any such consent as aforesaid to carry on the said business down to the date of the hearing of the complaint.

On June 12, 1912, the chief inspector of nuisances for the borough visited the yard, and found that the appellants were then carrying on the said business of dealers in raw hides and skins in a stable about seventeen feet square in which in addition to raw hides and skins there was a certain amount of fat and bones, that the floor of the stable was of soft porous bricks with wide open joints, and that the premises were insufficiently lighted and ventilated and without a proper supply of water. On July 16, 1912, the inspector again visited the yard, and found that the appellants were still carrying on the said business in the stable, and also in another stable in the said yard fifteen feet from the nearest dwelling-house, that a drain outside the stables was blocked up and a pool of filthy water was in a channel in the stables, that two of the walls were of rough bricks which had never been lime-washed and were dirty, while two other walls were merely wooden partitions, that the water supply was from thirty to thirty-five yards away, and that both the places smelt offensively and were unsuitable for such a business.

The appellants contended that, as they had established and commenced to carry on the business within the borough of Cheltenham before the making and confirmation of the order declaring the trade of a dealer in raw hides and skins within the borough to be an offensive trade, the order did not apply to them, and that no offence was committed by them in carrying on the business within the borough without the consent in writing of the urban authority after the making and confirmation of the order.

The respondent contended that, as the business had been

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declared by the said order, duly confirmed by the Local Government Board, to be an offensive trade and had been established since the passing of the Public Health Act, 1875, without the consent in writing of the urban authority, the carrying on of such business was an offence within the meaning of s. 112 of the Public Health Act, 1875, as amended by s. 51 of the Public Health Acts Amendment Act, 1907, as it was therein expressly provided that any person carrying on a business so established should be liable to a penalty, whether there had or had not been any conviction in respect of the establishment thereof.

The justices were of opinion that, although the business had been established by the appellants within the borough without the consent of the urban authority after the passing of the Public Health Act, 1875, but before the making and confirmation of the order declaring the trade of a dealer in raw hides and skins within the borough to be an offensive trade, yet having regard to the terms of the Act of 1875, as amended by the Act of 1907, and the object for which the same was passed, namely, to protect the public not only from having an offensive trade established, but also if established from its being carried on, it was their duty to construe the Act in the sense which would best advance the remedy and suppress the mischief, although perhaps giving a retrospective operation to the enactment, and they therefore came to the conclusion that the carrying on of the business after the making and confirmation of the said order constituted an offence within the statute, and they accordingly convicted the appellants of the offence of carrying on and continuing to carry on the said business on the dates alleged in the complaint and imposed a fine of 2*l.* and 10*s.* costs.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law.

Cranstoun, for the appellants. The appellants, whose business of dealers in raw hides and skins was established in the borough of Cheltenham before the making and confirmation of the order of the local authority declaring the trade to be an offensive trade, committed no offence by carrying on that business since the

order within s. 112 of the Public Health Act, 1875, as amended by s. 51 of the Public Health Acts Amendment Act, 1907. At the time when the appellants established their business of dealers in raw hides and skins in the borough they were entitled to do so, and the fact that an order was subsequently made and confirmed declaring the trade to be an offensive trade did not make the carrying on of the business so established an offence against the Act. The offence is the carrying on of a trade which has been established since the making and confirmation of an order declaring it to be an offensive trade. The words "so established" clearly mean that. The Act did not intend that such an order should have a retrospective operation. If the order were to apply to a business already established a person might expend money in establishing a lawful business which by a subsequent order might be declared to be an offensive trade, and the carrying on of that business would then be prohibited. Such a result could not have been intended.

J. B. Matthews, for the respondent. The contention of the appellants would result in this, that after the order of September 7, 1909, declaring s. 51 of the Public Health Acts Amendment Act, 1907, to be in force in the borough of Cheltenham, a person might establish a business which was not then declared by order of the local authority to be an offensive trade, and which was not one of the six offensive trades specified in s. 112 of the Public Health Act of 1875, however offensive such a business might be, and having so established it he would be entitled to carry it on after the order of the local authority without being subject to proceedings being taken against him under the section. Such a construction of the section would be unreasonable. By s. 112 of the Act of 1875 as it originally stood a person establishing or carrying on any one of the six specified offensive trades or "any other noxious or offensive trade, business, or manufacture" was liable to a penalty. A person, therefore, might expend money in establishing a trade, business, or manufacture in a borough which might afterwards be declared in proceedings before justices for a penalty to be a noxious or offensive trade. The effect of the amendment introduced by s. 51 of the Act of 1907 into s. 112 of the Act of 1875

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is to substitute for the order of justices the order of the local authority, when confirmed by the Local Government Board, declaring a trade to be an offensive trade. Therefore since the coming into operation of the Act of 1907 any person can at his peril establish a business, not being one of the six specified offensive trades, and that business may afterwards be declared by an order of the local authority to be an offensive trade, and the person who carries it on after the order is liable to a penalty; just as before the Act of 1907 the business might have been declared to be an offensive trade by an order of justices. The true construction of s. 112 of the Act of 1875 as amended is that after the order of the local authority the future carrying on of the business is an offence. The trader is not without remedy because he can apply to the local authority for its consent in writing to carry on the trade. The words "so established" in s. 112 of the Act of 1875 mean established within an urban district after the passing of that Act, and that construction is borne out by s. 51, sub-s. 2, of the Act of 1907. As Buckley L.J. pointed out in *West* v. *Gwynne* (1) retrospective operation of a statute is one matter; interference with existing rights is another. The construction which the respondent contends for does not make the Act retrospective in its operation. The justices were therefore right.

Cranstoun in reply. In *West* v. *Gwynne* (1) the question was as to the construction of s. 3 of the Conveyancing and Law of Property Act, 1892, whereas the present is a criminal case, and in such a case the Court will not give a retrospective operation to a statute creating a criminal offence: *Reg.* v. *Griffiths.* (2) As Lopes L.J. said in *Bourke* v. *Nutt* (3), "Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions already past, must be presumed to be intended not to have a retrospective effect."

RIDLEY J. This is a case stated by justices upon the hearing of a complaint under s. 112 of the Public Health Act, 1875, as

(1) [1911] 2 Ch. 1, at pp. 11, 12. (2) [1891] 2 Q. B. 145.
(3) [1894] 1 Q. B. 725, at p. 737.

amended by s. 51 of the Public Health Acts Amendment Act, 1907, that the appellants unlawfully carried on within the borough of Cheltenham the business of dealers in raw hides and skins, which business was by an order made by the urban authority and duly confirmed declared to be an offensive trade. The justices convicted the appellants. In order to understand the finding of the justices it is necessary to refer to the two Acts. By s. 112 of the Public Health Act, 1875, "Any person who, after the passing of this Act, establishes within the district of an urban authority, without their consent in writing, any offensive trade; that is to say, the trade of"—then follow six specified trades—"or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty not exceeding 50*l.* in respect of the establishment thereof, and any person carrying on a business so established shall be liable to a penalty not exceeding 40*s.* for every day on which the offence is continued." By s. 51, sub-s. 1, of the Public Health Acts Amendment Act, 1907, the words in the above section "any other noxious or offensive trade, business, or manufacture" were struck out, and the words "any other trade, business, or manufacture which the local authority declare by order confirmed by the Local Government Board, and published in such manner as the Board direct, to be an offensive trade," were substituted for them. The question which we have to determine is whether the appellants committed an offence in carrying on this business after the making and confirmation of the order declaring the trade to be an offensive trade. Have they carried on a business so established within the meaning of s. 112 of the Public Health Act, 1875? The words "a business so established" may be construed in one of two ways. On the one hand it may be said that the words mean a business established within the district of the urban authority after the passing of the Act. On the other hand it may be said that they mean a business established within the district of the urban authority after the passing of the Act and after the making and confirmation of the order of the local authority declaring it to be an offensive trade. In my opinion the latter is the more natural meaning of the words. It is possible to say that

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the effect of the introduction by s. 51 of the Act of 1907 of the words "any other trade, business, or manufacture which the local authority declare by order . . . . to be an offensive trade" is to make the order of the local authority equivalent to the finding of the justices before that Act that the trade was an offensive trade. That is the contention put forward on behalf of the respondent, and it would have in its favour the reasons given by the justices in this case for the decision at which they have arrived. At one time I was impressed by that argument, but upon consideration I have come to the conclusion that the contention presented on behalf of the appellants must prevail. That contention is that the enactment ought not to be construed so as to give it a retrospective operation, especially as it is a criminal matter, unless the language clearly shews such an intention. In my opinion s. 112 as amended (leaving out of consideration the six specified offensive trades) means that the offence of establishing the offensive business is only committed where the business has at the time of its establishment already been declared by order to be an offensive trade, and that a person who is prosecuted for carrying on an offensive business must be found to be carrying on the business "so established," that is to say, established after the order declaring it to be an offensive trade. I can quite understand the considerations which influenced the justices in arriving at their decision, but, though those are matters which should not be left out of account, it is our duty to construe the words of the Act according to the ordinary rules of construction. We must give the words their natural meaning, giving full effect to all the words of the section. The appeal must therefore be allowed and the conviction quashed.

PICKFORD J. I am of the same opinion. Sect. 112 of the Public Health Act, 1875, enacts that any person who after the passing of the Act establishes within the district of an urban authority, without their consent in writing, any offensive trade, that is to say, one of six named trades, or any other noxious or offensive trade, business, or manufacture, shall be liable to a penalty not exceeding 50*l.* in respect of the establishment thereof. So far the offence is the establishing of an offensive trade without

the consent in writing of the urban authority. It is obvious, however, that a penalty of 50*l.* might not be sufficient to put a summary stop to the mischief contemplated, inasmuch as it might be worth the trader's while to pay the fine and continue to carry on the business. The section accordingly further renders a person who carries on a business so established liable to a penalty not exceeding 40*s.* for every day on which the offence is continued. That imposes a daily penalty for the continuing offence of carrying on an offensive business "so established." The section therefore, as it originally stood, aimed at the establishing of an offensive trade after the passing of the Act without the consent in writing of the urban authority, and the carrying on of the trade after it had been so established. No difficulty could arise with regard to the six named offensive trades. With regard to "any other noxious or offensive trade, business, or manufacture" it could not have been said what was a noxious or offensive trade until it had been so found by a Court of summary jurisdiction in proceedings taken to recover a penalty. But when the Court found that the trade was a noxious or offensive trade, it was such when established. That was the position under s. 112 of the Public Health Act, 1875, as unamended. Sect. 51 of the Public Health Acts Amendment Act, 1907, substitutes the words "any other trade, business, or manufacture which the local authority declare by order confirmed by the Local Government Board, and published in such manner as the Board direct, to be an offensive trade," for the words "any other noxious or offensive trade, business, or manufacture" in s. 112 of the Act of 1875. It seems to me that the effect of those words is, as was the case before the Act of 1907, to describe the business when it was established, and that therefore to make it an offence within the section as amended the business must have been declared by order of the local authority duly confirmed to be an offensive one at the time when it was established.

It is contended that the result of this view of the enactment would be that a person might establish an offensive business, not being one of the six specified in the section, before the order declaring it to be an offensive trade, and having once established

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it he might be entitled to carry it on without interference under this section from the local authority. That may possibly be a consequence of our decision, but when the words of the Act are clear the Court cannot regard the consequences. If, however, we are to regard the consequences, the enactment as construed by the respondent might prove to be a serious trap for the person establishing a business. Under s. 112 before it was amended, if a person established a business, not being one of the six businesses specified in the section, in an urban district, he was liable to have an order of justices made against him declaring his business to be an offensive trade. The amendment introduced into s. 112 was intended to remedy that. Since that amendment any person wishing to establish a business would naturally inquire what businesses had been declared by order to be offensive trades, and seeing that the business which he wished to establish was not one of the six specified offensive trades, and was not among those which had been declared by order of the local authority to be an offensive trade, he might think that he was entitled to establish it, and it would be converting the enactment into a trap if his business could be made an offensive one by a subsequent order. If therefore one regards the consequences there seems quite as much to be said on one side as on the other. Nor do I think that the local authority are left entirely without remedy against the person establishing a business which may subsequently be declared to be an offensive trade. It is true that they are deprived of the convenient and summary remedy. But still the general law applies and the remedy by indictment or injunction remains open to them. Moreover they can, under s. 51, sub-s. 2, of the Act of 1907, "make by-laws with respect to any trade which is an offensive trade under s. 112 of the Public Health Act, 1875, as amended by this Act, whether established before or after the commencement of this Act, in order to prevent or diminish any noxious or injurious effects of the trade." Therefore the local authority as representing the public are not left entirely without protection and remedy, though they have not the simple and expeditious remedy provided by the Act. The offence is the establishing or carrying on of an offensive trade without the consent in writing of the urban authority, and

in order that the trade should be an offensive trade within the meaning of the section it must be either one of the six specified trades or a trade which at the time it was established had been declared by order of the urban authority to be an offensive trade. It seems to me that the provision in s. 51, sub-s. 1, of the Act of 1907 that the order shall be published points in the same direction, the object evidently being that persons may know what trades have been declared to be offensive trades. In the present case the trade had not been declared by order to be an offensive trade at the time when it was established, and the appellants cannot be convicted under the section of carrying on that trade.

AVORY J. I am of the same opinion. The justices have placed a construction upon the Act which would subject persons to a penalty who are carrying on a business which, when it was established, was a lawful business and which was not declared to be an offensive trade by any order made by the local authority under the Act. No doubt the Legislature might give a retroactive effect to the enactment, and if they did so the Courts must give effect to it. But if there is any other reasonable construction of the Act which has regard to vested interests, that construction should be adopted in preference to the other, especially when one sees that the construction contended for by the respondent gives no effect to the words "so established" in s. 112 of the Public Health Act, 1875. Having regard to those words it is clear to me that a person does not commit the offence of carrying on an offensive business unless the business at the time when it was established had been declared by order to be an offensive trade. The decision of the Court in this case leaves it open to the local authority to make by-laws under s. 51, sub-s. 2, of the Public Health Acts Amendment Act, 1907, for the purpose of regulating as distinct from forbidding the business already established, and that sub-section lends support to the construction which we are placing upon the previous sub-section because it expressly gives power to the local authority to make those by-laws applicable whether the trade was established before or after the commencement of the Act. Further, as has been

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BUTCHERS' HIDE, SKIN, AND WOOL COMPANY, LIMITED v. SEACOME.

already pointed out, the business no matter when established is subject to the general law of the land as to nuisance. The conviction must be quashed.

Appeal allowed.

Solicitors for appellants: *McKenna & Co., for W. H. Russell, Cheltenham.*

Solicitor for respondent: *Kenard Ball, for R. Owen Seacome, Cheltenham.*

W. F. B.

C. A.
1913
April 24, 25.

[IN THE COURT OF APPEAL.]

MUIR *v.* JENKS.

[1912 M. 1113.]

Practice—Writ indorsed for Liquidated Demand—Reduction of Amount by Payment—Judgment in Default of Appearance—Judgment for Amount in Excess of Sum actually due—Setting aside—Amendment — Order XIII., *rr.* 3, 10—*Order* XXVIII., *r.* 11—*Order* LXX., *rr.* 2, 3.

Where a plaintiff signs judgment in default of appearance for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, subject to the right of the plaintiff, in a proper case, to apply to have the amount of the judgment reduced. Delay on the part of the debtor will not necessarily deprive him of his right to have the judgment set aside.

Hughes v. *Justin* [1894] 1 Q. B. 667, followed.

Armitage v. *Parsons* [1908] 2 K. B. 410, distinguished.

APPEAL from a decision of Bucknill J.

In August, 1911, the defendant, William Jenks, carrying on business as William Jenks & Co., was indebted to the plaintiff in the sum of 290*l.* 12*s.* 7*d.* in respect of certain Stock Exchange transactions.

On August 21, 1911, the plaintiff signed judgment against the defendant for want of appearance for 290*l.* 12*s.* 7*d.*, debt, and 4*l.* 14*s.* for costs.

On December 13, 1911, the plaintiff issued a bankruptcy notice against the defendant founded on the said judgment, and in due course presented a bankruptcy petition against him.

Before the hearing of the petition an agreement was come to between the parties which was embodied in the following document, dated April 19, 1912:—

"In consideration of your dismissing the bankruptcy petition herein against us we agree to pay your costs of the bankruptcy proceedings negotiations and arrangement as between solicitor and own client which we agree at 40*l.*, and the amount of judgment debt costs and interest to date hereof . . . . making together the sum of 328*l.* 16*s.* 7*d.* together with interest at 4 per cent. per annum from date hereof by instalments of 10*l.* per month, the first instalment of 10*l.* to be paid on the 1st day of April, 1912, and the sum of 10*l.* on the first day of each succeeding month. In default of payment of any instalment for seven days after the same becomes due you are to be at liberty to proceed for the full amount owing at the time of such default. William Jenks & Co."

By another document of even date the defendant's son, Edward R. Jenks, guaranteed the payment of the instalments under the above-mentioned agreement.

The first two instalments not having been paid, on May 2, 1912, the plaintiff issued and served upon the defendant a writ for 328*l.* 16*s.* 7*d.*

On May 8, 1912, the defendant and E. R. Jenks called upon the plaintiff's solicitors, and E. R. Jenks then paid to the solicitors the sum of 20*l.* on account of the defendant's debt.

On May 15, 1912, the plaintiff signed judgment against the defendant in default of appearance for 328*l.* 16*s.* 7*d.* and 4*l.* 14*s.* costs, no credit being given for the 20*l.* paid by E. R. Jenks. It appeared that this was owing to an oversight. On May 16 the plaintiff's solicitors gave notice to the defendant that the judgment had been signed.

On June 21, 1912, a further agreement was come to between the parties whereby, instead of E. R. Jenks paying the 10*l.* per month as previously agreed, it was agreed that E. R. Jenks should make and the plaintiff should accept certain other payments in reduction of the defendant's debt.

In January, 1913, the plaintiff caused to be issued against the defendant a bankruptcy notice founded upon the judgment of

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May 15, 1912, but claiming only the amount of the judgment less the 20*l.* and other amounts since paid by E. R. Jenks.

On March 7, 1913, the defendant took out a summons to have the judgment of May 15, 1912, set aside on the ground that the writ had not been properly served upon the defendant.

At the hearing of the summons counsel for the defendant took the point that the judgment was irregular on the ground that it was signed for the wrong amount. It was then suggested by the Master that the error might be rectified as a slip, but counsel for the plaintiff took the view that as the bankruptcy notice was served for the right amount nothing would be gained by rectifying the judgment. The Master then dismissed the defendant's summons on the ground of his delay; and that decision was upheld by Bucknill J.

The defendant now appealed to the Court of Appeal on the ground (inter alia) that the judgment was wrong inasmuch as the same was signed and made for a larger sum than was in fact due and owing from the defendant to the plaintiff.

F. Dodd, for the appellant. The judgment being in fact wrong and for a larger sum than was in fact due from the defendant to the plaintiff, the defendant is entitled ex debito justitiæ to have it set aside, and delay by the defendant in applying to have it set aside is no answer to the application: Rules of the Supreme Court, Order XIII., r. 10. A judgment irregularly obtained will be set aside independently of the question of merits: *Anlaby* v. *Prætorius* (1); *Hughes* v. *Justin.* (2) In *Armitage* v. *Parsons* (3) the error in the judgment was very slight and the Court on the application of the plaintiff treated it as a slip and amended the judgment. Here the plaintiff before the Master declined the proposed rectification and the defendant is entitled to have the judgment set aside.

E. W. Hansell, for the respondent. The Court will not interfere with the discretion which has been exercised by the Master and the judge. The defendant has been guilty of unreasonable delay which precludes him from now having the judgment set aside:

(1) (1888) 20 Q. B. D. 764. (2) [1894] 1 Q. B. 667.
(3) [1908] 2 K. B. 410.

Order XIII., rr. 3, 10, and Order LXX., r. 2. Moreover the defendant's objection to the judgment was not truly stated on his summons as required by Order LXX., r. 3. If necessary, the amount of the judgment can now be reduced under the slip order: Order XXVIII., r. 11. There is unquestionably a considerable debt due from the defendant to the plaintiff, and the judgment ought not to be set aside as wholly bad.

[BUCKLEY L.J. How can you distinguish this case from *Hughes* v. *Justin*? (1)]

That is dealt with by Sir Gorell Barnes P. in *Armitage* v. *Parsons* at p. 414.

The respondent asks the Court to adopt the view which was taken by this Court in *In re Mosenthal, Ex parte Marx* (2), where a judgment which was accidentally signed for too large a sum was not set aside, but was reduced in amount.

BUCKLEY L.J. Under somewhat peculiar circumstances the defendant claims to have a judgment which has been entered against him set aside. [The Lord Justice stated the facts, and continued:] The bankruptcy notice therefore asked for payment of the correct sum, but it was founded upon the judgment which was for an incorrect sum. The point was taken before the Master, who suggested that the judgment should be amended as being wrong through an accidental slip, but counsel for the plaintiff, so far from seeking to have the judgment put into proper form, took the view that no good was to be obtained by that course and elected to stand by his judgment as it was. From May, 1912, to March, 1913, no question as to the judgment was raised by the debtor. Both the Master and the judge appear to have thought that the debtor himself ought to have taken steps to get the judgment corrected and that for default in so doing he was now precluded by delay from having the judgment set aside. In my opinion that is wrong. It is the duty of the creditor if he obtains a wrong judgment to have it set right. It is not the duty of the debtor against whom he has obtained the judgment to do so. The question therefore does not turn upon delay by the debtor. The position is this. Here is a judgment which is wrong. The

(1) [1894] 1 Q. B. 667. (2) (1910) 54 Sol. J. 751.

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Buckley L.J.

person who holds it has not sought to set it right, on the contrary he has said that there was no good in doing so. Under these circumstances the bankruptcy notice is founded upon a wrong judgment. What then is to be done? There are three cases which assist me. One of them, a decision of this Court in *Hughes* v. *Justin* (1), is directly in point. That was a case in which a writ was issued indorsed for a liquidated demand, and after the writ had been issued, but before either the plaintiff or the defendant knew that it had been issued, they met, and it is stated that this took place: they discussed the question of the indebtedness of the defendant, and of a claim which he asserted he had against the plaintiff. The result of the discussion was that a sum was agreed on which the defendant was to pay in settlement of the whole matter, and that sum was accordingly paid. Notwithstanding that, judgment was signed for the debt and costs. The only indebtedness was for the amount of the costs. The judgment for debt and costs was irregular. The point argued was that the judgment was for too large a sum, that the debt was gone but that the liability for costs remained. That was the view which the Court took of the state of things. Lord Esher in giving judgment says this: "Although the plaintiff was within his rights in issuing the writ he was wrong in signing judgment for more than was then due, and as nothing was due he could only sign judgment for the costs." Lopes L.J. says: "The judgment signed was one which the plaintiff was not entitled to, and it must be set aside." He quotes what was said by Willes J. in *Hodges* v. *Callaghan* (2): "The plaintiff ought to represent the Court as pronouncing judgment in his favour only for the sum which is really due to him"; and then goes on to say: "It appears to me that the defendant had a right, as pointed out in *Anlaby* v. *Prætorius* (3), to have the irregular judgment set aside, and that must be done." I pause to say that I do not think *Anlaby* v. *Prætorius* (3) was a decision which necessarily led to this because it was on a different ground, namely, that the plaintiff was not entitled to sign

(1) [1894] 1 Q. B. 667.
(2) (1857) 2 C. B. (N.S.) 306, at p. 315.
(3) 20 Q. B. D. 764.

judgment at all, not that he was signing judgment for a wrong sum. However, *Hughes* v. *Justin* (1) is an authority for the following proposition: If the plaintiff in the absence of the defendant, proceeding properly under the rules, signs judgment for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, unless the party who holds the judgment applies as he may to reduce it to the proper amount. If application to amend be duly made it may be right not to set the judgment aside but to reduce it to the proper sum; but unless the party who holds the judgment elects to have it put right, then upon the authority of *Hughes* v. *Justin* (1) it seems to me the defendant is entitled to say "This is a wrong judgment, set it aside." In the case of *Armitage* v. *Parsons* (2) the right to amend which I have mentioned was exercised. The application there was to set aside the judgment, but the judgment was reduced. The party by mistake had charged 5*l.* 6*s.* instead of 4*l.* 14*s.* for costs. He had exceeded the proper amount by a trifling sum of 12*s.*, and the Court decided that they were not driven to set aside the judgment when the party who held it asked them to reduce it to a proper sum. That is the position of the authorities. In the present case the party holding the judgment has never availed himself of that right to bring it down to a proper sum. He has issued a bankruptcy notice upon the footing that the judgment is right, and at the same time by giving credit in the bankruptcy notice for 20*l.*, which was paid before the judgment was signed, he has, on the face of the notice itself, affirmed that the judgment was wrong. In this state of things it seems to me that the defendant is entitled to say "Inasmuch as you have never sought to set your judgment right but have sought to enforce it by a bankruptcy notice in which you, at the same time, deduct the sum which shews that the judgment is wrong, I am entitled to have the judgment set aside." I therefore think that this appeal succeeds, and that the judgment must be set aside with costs.

KENNEDY L.J. I am of the same opinion. We have had an interesting discussion of these cases, and although the matter

(1) [1894] 1 Q. B. 667. (2) [1908] 2 K. B. 410.

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is a technical one it is important, having regard to the consequences which follow from such a judgment, that the question should not be treated as merely a matter of form. I agree with what Buckley L.J. has said as to the effect of *Hughes* v. *Justin*. (1) I do not think that we can decide otherwise than as he has stated without disregarding the decision of this Court in that case. We may regret that all these proceedings have been taken and the result of them when there is unquestionably a very considerable debt due from the debtor to the creditor. At the same time it is important that we should see that claims which are based upon a judgment signed for an excessive amount are not allowed to succeed when the course which has been deliberately taken by the creditor has prevented that amendment for the correction of the error which might have been made, in my view, in accordance with the rules and the authorities.

Appeal allowed.

Solicitors: *H. F. K. Ireland*; *Cohen & Cohen*.

(1) [1894] 1 Q. B. 667.

G. A. S.

THE KING *v.* WIGAND.

1913
May 2.

Practice—Disobedience of Order of Court—Absence of Personal Service—Disobedient Person going out of Jurisdiction — Writ of Sequestration—Order XLIII., *r.* 6.

Where a person, against whom an order had been made in the King's Bench Division ordering him to do a particular act, disobeyed the order with full knowledge of its having been made and went out of the jurisdiction before it had been formally served upon him, the Court, on an application for the issue of a writ of sequestration to enforce the order, dispensed with personal service of the order disobeyed and directed the writ to issue.

Practice of the Probate and Divorce Division in that respect followed.

RULES for habeas corpus and for attachment.

Disputes having arisen between Friedrich Wigand and Paulette Wigand, his wife, Mrs. Wigand on March 7, 1913, left her husband, taking with her their daughter, aged four. Shortly afterwards the child was forcibly removed from Mrs. Wigand's mother's house, where she was staying, by persons acting on behalf of her husband. Mrs. Wigand obtained a writ of habeas corpus directing her husband to bring the child before the Court, and on April 21 Bailhache J. ordered her husband to deliver the child into her custody, with liberty for him to have access to the child upon Saturday afternoons and to take it out during those hours, Mr. and Mrs. Wigand both undertaking not to remove the child out of the jurisdiction of the Court. The husband appealed against that order, and the Divisional Court affirmed it with the variation that the times during which he was to have access were enlarged. On April 30 the husband in exercise of his right of access took the child out for a walk and omitted to return it into the mother's custody as under the order of the Court it was his duty to do. On May 1 the Divisional Court granted a rule for his attachment for disobedience of the order of Bailhache J. It then appeared that he had gone to Germany, taking the child with him. Application was then made on behalf of Mrs. Wigand that the rule for attachment should be made absolute and that the order of Bailhache J. should be enforced by a writ of sequestration.

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That order had not been formally served upon the husband in accordance with Order XLIII., r. 6, of the Rules of the Supreme Court, and owing to his having left the country personal service of it was no longer possible. For the same reason the rule for attachment had not been served on him. He had, however, been present in Court when Bailhache J.'s order of April 21 was made, and the undertaking not to remove the child out of the jurisdiction had been made by his counsel with his authority.

Theobald Mathew, for Mrs. Wigand. The husband is in contempt. He has disobeyed the order to return the child to the custody of the wife, and also has broken his undertaking not to take it out of the jurisdiction. Although under ordinary circumstances a rule for attachment will not be made absolute nor a writ of sequestration issued except upon proof that the order disobeyed was duly served, such service is not a necessary condition where it is clear that the disobedient person is evading service. With the writ of sequestration as a punitive method the King's Bench Division is not familiar, but it is common in the Probate and Divorce Division, and the cases of *Miller* v. *Miller* (1), *Allen* v. *Allen* (2), and *Hyde* v. *Hyde* (3) shew that where the person to be served is keeping out of the way in order to avoid personal service the Court will dispense with service.

The husband was unrepresented.

RIDLEY J. I am of opinion that we ought to make the rule for attachment absolute, and also to direct the issue of a writ of sequestration. The respondent had full knowledge that in neglecting to return the child to its mother he was breaking the order of the Court, and in taking it out of the jurisdiction he committed a breach of his undertaking. He left the country well knowing that proceedings would be taken to enforce the Court's order, and took the child with him with the intention of defying the Court. Although Order XLIII., r. 6, provides that where any person is directed by any judgment or order to do any act "and after due service of such judgment or order

(1) (1870) L. R. 2 P. & M. 54. (2) (1885) 10 P. D. 187.
(3) (1888) 13 P. D. 166.

refuses or neglects to obey the same" a writ of sequestration may be issued, if it be shewn that the disobedient person is evading personal service, the writ may be issued without proof of service. There appear to have been several cases in the Probate and Divorce Division in which that has been done, and I propose to follow that practice.

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REX v. WIGAND.

Ridley J.

AVORY J. I am of the same opinion.

Rule absolute for attachment and order for writ of sequestration.

Solicitors for Mrs. Wigand: *Munton, Morris & Co.*

J. F. C.

[COURT OF CRIMINAL APPEAL.]

1911

Nov. 14.

THE KING *v.* MESSER.

Larceny—Taxicab Driver—Failure to account to Cab Proprietor for his Share of Takings—Receipt for or on Account of Proprietor—Larceny Act, 1901 (1 *Edw.* 7, *c.* 10), *s.* 1, *sub-s.* 1 (*b*).

Where the proprietor of a taxicab delivers it to a driver for the purpose of his plying with it for hire upon the terms that the driver will hand over to him a certain percentage of the day's takings while retaining the balance for himself it is competent for the jury to find that, to the extent of the proprietor's share, the fares received by the driver from the public are so received by him for or on account of the proprietor within the meaning of s. 1 of the Larceny Act, 1901.

APPEAL to the Court of Criminal Appeal.

The appellant, Robert Messer, was tried at the Central Criminal Court before the Common Serjeant upon an indictment charging him with having received the sum of 6*l.* 3*s.* 6*d.* for and on account of Robert Bell and fraudulently converted it to his own use. Robert Bell was a taxicab proprietor, and the appellant had for some time acted as a driver of one of his taxicabs. The terms on which he so acted, and which were not reduced to writing, were that he should keep one fourth of the day's takings

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for his own remuneration and should hand over the remaining three fourths to Mr. Bell. He received no wages. These were the terms on which all the drivers who plied for hire with Mr. Bell's taxicabs were allowed the use of them. It was the practice of the yard for each driver on returning his cab at the end of the day to sign a printed sheet headed "Account for the day," in which account were set out the various items of the fares received by the driver, the "total receipts for the day," the "driver's proportion 25 per cent.," and the "balance being amount due from driver," and to certify that the figures were correct. On September 2, 1911, the appellant took out a taxicab from Mr. Bell's yard on the above terms, and in the ordinary course he should have returned it the same evening. He, however, neglected to return it until September 9, on which date the taximeter shewed that the total receipts were 8*l.* 4*s.* 8*d.* In accordance with the ordinary practice the printed sheet of the account was made out, shewing the driver's proportion to be 2*l.* 1*s.* 2*d.* and the balance due from driver to be 6*l.* 3*s.* 6*d.* That sum the appellant failed to pay, and he accounted for his inability to pay it by the statement that he had dropped his purse out of his pocket. There was some evidence that the meter had been tampered with. The Common Serjeant left it to the jury to say whether the 6*l.* 3*s.* 6*d.* had been received by the appellant for and on account of Bell. (1) The appellant was convicted, and appealed against the conviction.

C. W. Kent, for the appellant. There was no evidence on which the jury could properly find that the money was received for or on account of Bell, the owner of the taxicab. To establish that it would be necessary to shew that the relation between the proprietor and driver was that of master and servant, and there was no evidence of that control over the driver's acts which is essential to the existence of that relation. No doubt as towards the public the cab owner is the driver's master, but as between

(1) By the Larceny Act, 1901, s. 1, sub-s. 1, "Whosoever . . . (*b*) having, either solely or jointly with any other person, received any property for or on account of any other person, fraudulently converts to his own use or benefit . . . . the property or any part thereof . . . . shall be guilty of a misdemeanour."

the cab owner and the driver the relation is that of bailor and bailee only. In *Smith* v. *General Motor Cab Co.* (1) the House of Lords upheld the finding of a county court judge to that effect on precisely similar facts, Lord Shaw saying, "In my opinion quoad the cab, the contract was an ordinary contract of locatio rei."

[HAMILTON J. The Lords there treated the question of the relation between the parties as one of fact, there being evidence on which the county court judge might have found either way.]

If the relation was that of bailor and bailee the driver received the fares on his own account alone, and none the less because the price which he had contracted to pay for the hire of the cab depended upon the amount of those receipts. The neglect to pay that price was properly the subject of an action for a civil debt and not of a criminal indictment. The judge at the trial apparently felt himself bound by the decision in *Rex* v. *Solomons* (2), where a taxicab driver was held to have been rightly convicted under the Larceny Act, 1901, of having converted to his own use the fares which he had received for and on account of the cab proprietors (3). But the counts under which he was so convicted formed part of an indictment under which he was also convicted of having as a servant falsified certain accounts in breach of s. 1 of the Falsification of Accounts Act, 1875. So that the jury there found that the man was a servant, whereas there is no such finding here.

Bassett Hopkins, for the prosecution, was not called upon.

The judgment of the COURT (Darling, Hamilton, and Bankes JJ.) was delivered by

DARLING J. It is necessary to bear in mind that the appellant in this case was not charged with any offence committed by him as a servant, as was the appellant in *Rex* v. *Solomons* (2), and therefore the grounds of the decision in that case have no application to the present. The appellant here was charged under s. 1, sub-s. 1 (*b*), of the Larceny Act, 1901, which provides that "Whosoever . . . . having, either solely or jointly

(1) [1911] A. C. 188. (2) [1909] 2 K. B. 980.
(3) Ibid. at p. 986, n.

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with any other person, received any property for or on account of any other person, fraudulently converts to his own use or benefit . . . . the property or any part thereof" shall be guilty of a misdemeanour. The indictment charged that he received the sum of 6*l.* 3*s.* 6*d.* for and on account of Robert Bell and fraudulently converted the same to his own use. The appellant was the driver of a taxicab which he took out of Mr. Bell's yard on September 2, 1911, on the terms that he was to pay 75 per cent. of the fares that he received to Bell and that he was to retain the remaining 25 per cent. for his own benefit. It was the practice for the cabdrivers on returning the cab at the end of the day to sign a sheet, on which was made out the "Account for the day" taken from the taximeter readings, and certify that the figures in the account were correct. Upon returning the cab the appellant signed a sheet which contained the following figures:—"Total receipts for the day, 8*l.* 4*s.* 8*d.* Driver's proportion 25 per cent., 2*l.* 1*s.* 2*d.* Balance being amount due from driver, 6*l.* 3*s.* 6*d.*" It may be that he received the whole 8*l.* 4*s.* 8*d.* on account of Bell. But the case was not put so high as that; the appellant was only charged with receiving 6*l.* 3*s.* 6*d.* on Bell's account. In our opinion there was certainly evidence to go to the jury that he received that sum for and on account of Bell, and that the Common Serjeant was quite right in leaving the case to the jury.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

THE KING *v.* THE LICENSING JUSTICES OF KINGSTON-UPON-HULL.

1913
April 23.

Licensing Acts—Licence—Renewal—Old On-Licence—Fully Licensed Premises—Premises of less than required Annual Value—"Disqualified Premises"—Licence void—Discretion of Licensing Justices to refuse Renewal—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *ss.* 18, 19, 34, 36, 37; *Sched. II.; Sched. V., Part I.*

Upon an application at the general annual licensing meeting for the renewal of an old on-licence in respect of a fully licensed house which was first licensed since August 10, 1872, it was proved that the annual value of the premises was less than that required by s. 37, sub-s. 1 (*b*), and Sched. V., Part I., of the Licensing (Consolidation) Act, 1910. The licensing justices refused the renewal upon the ground that as the premises were not of the required annual value the licence would be void:—

Held, that, as the premises by reason of their deficiency in value were not qualified to receive the licence, they were "disqualified premises" within the meaning of s. 34 of the Act, and that therefore the licence if renewed would have been void; and that the licensing justices had jurisdiction under s. 18 and Sched. II., Part II. (B) (3.), to refuse the renewal upon that ground, and were not bound to refer the question of renewal to the compensation authority under s. 19.

Rule calling upon the licensing justices in and for the city and county of Kingston-upon-Hull to shew cause why a writ of mandamus should not issue commanding them or some of them to hold pursuant to the statutes in that behalf within a reasonable time a further adjournment of the general annual licensing meeting holden by adjournment on or about March 3, 1913, and at such further adjournment to proceed to hear and determine pursuant to the statutes in that behalf the matter of an application by one Richard Thompson for the renewal of the justices' licence for the sale by retail of intoxicating liquors at the Milton Hotel, in the said city and county, on the ground that the justices had no jurisdiction to refuse the renewal of the licence of the said hotel.

The Milton Hotel was a fully licensed house which was first licensed in 1877, and the licence had been annually renewed from that time down to the general annual licensing meeting for 1913. It was therefore an "old on-licence" within the meaning of s. 18 of the Licensing (Consolidation) Act, 1910.

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Before the general annual licensing meeting for 1913 the Chief Constable of Kingston-upon-Hull duly gave notice of his intention to oppose the renewal of the licence of the Milton Hotel on the ground that the renewal of the licence would be void, inasmuch as the premises sought to be licensed were not of the annual value required by Part I. of Sched. V. to the Licensing (Consolidation) Act, 1910 (1), namely, 50*l.*

(1) 10 Edw. 7 & 1 Geo. 5, c. 24, s. 18: "(1.) The power to refuse the renewal of any such justices' on-licence as is described in the First Part of the Second Schedule to this Act (in this Act referred to as an old on-licence) on any ground other than any of the grounds specified in the Second Part of that schedule shall be vested in the compensation authority and not in the licensing justices, but shall only be exercised on a reference from those justices and on payment of compensation in accordance with this Act."

By Sched. II., Part I., an old on-licence was described as being a justices' on-licence which was in force on August 15, 1904, including licences granted by way of renewal of a licence so in force. By Part II. (B), the specified grounds in the case of an old on-licence other than an old beer-house licence were "(1.) the ground that the licensed premises have been ill-conducted or are structurally deficient or structurally unsuitable; (2.) grounds connected with the character or fitness of the proposed holder of the licence; (3.) the ground that the renewal of the licence would be void."

Sect. 34: "A justices' licence shall not be granted, whether as a new licence or by way of renewal or transfer, to any person who is a disqualified person for the purposes of this Act during the continuance of the disqualification, and a justices' licence shall not be granted in respect of or removed to any premises which by virtue of this Act are disqualified premises during the continuance of the disqualification, and a justices' licence held by a person so disqualified or attached to premises so disqualified shall be void."

Sect. 36: "Premises are disqualified premises for the purposes of this Act—

"(1.) If the justices' licences of two persons licensed in respect of the premises (being persons neither of whom held a justices' licence in respect of the premises on August 10, 1872) are forfeited within any period of two years, the disqualification to continue for one year from the date of the last forfeiture; and

"(2.) If by virtue of any other Act a justices' licence cannot be granted in respect of those premises."

Sect. 37: "(1.) Subject to the exceptions contained in this section, premises shall not be qualified to receive a justices' on-licence unless— . . . . (*b*) the premises are of the required annual value as set out in Part I. of the Fifth Schedule to this Act."

By Sched. V., Part I., in the case of a justices' on-licence, the annual value of the premises in respect of

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The population of Kingston-upon-Hull, where the Milton Hotel was situated, exceeded 100,000. At the general annual licensing meeting held by adjournment on March 3 and 17, 1913, the licensee applied for the renewal of the licence for the Milton Hotel, and the licensing justices, having heard evidence as to the annual value of the premises as defined by s. 39, sub-s. 2, of the Act, including the evidence of a valuer appointed by them under s. 39, sub-s. 1, to value the premises, came to the conclusion that the annual value of the premises at the time of the application for the renewal of the licence was considerably below that required by the Act, and, overruling an objection taken on behalf of the applicant that they had no jurisdiction to refuse the renewal of the licence, they refused to renew the licence upon the ground that the renewal of the licence would be void, inasmuch as the premises sought to be licensed were not of the required annual value as set out in Part I. of Sched. V. to the Licensing (Consolidation) Act, 1910, namely, 50*l.*

The rule was obtained upon the ground that the licensing justices had no jurisdiction to refuse the renewal of the licence, which was an old on-licence, and that they could only refer the question of renewal to the compensation authority under s. 19 of the Act, who could refuse the renewal subject to the payment of compensation.

A. M. Latter, for the licensing justices, shewed cause. By s. 34 of the Licensing (Consolidation) Act, 1910, a justices' licence shall not be granted, whether as a new licence or by way of renewal, to any person who is a disqualified person, "and a justices' licence shall not be granted in respect of or removed to any premises which by virtue of this Act are disqualified premises," and a "licence held by a person so disqualified or attached to premises so disqualified shall be void." A grant includes the renewal of a licence: s. 16; and therefore the section in both its branches includes the renewal of a licence. By s. 37, sub-s. 1 (*b*), premises are not qualified to receive a justices' on-licence unless

which a justices' on-licence was not in force on August 10, 1872, is required to be 50*l.* where the premises are situated within any town containing a population of not less than 100,000.

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they are of the required annual value as set out in Sched. V., Part I., to the Act. The premises here are below the required annual value, and therefore they are by virtue of the Act "disqualified premises," and by s. 34 the licence if renewed would be void.

By s. 18 and Sched. II., Part II. (B), the licensing justices have power to refuse the renewal of an old on-licence (which is defined in Sched. II., Part I., as an on-licence which was in force on August 15, 1904) on "(3.) the ground that the renewal of the licence would be void." This ground covers the disqualification of the premises by reason of their value being less than that required. It is no objection to this argument that in the case of an old on beer-house licence one of the specified grounds upon which licensing justices can refuse the renewal is, by Sched. II., Part II. (A) (4.), that the house is not duly qualified as by law is required. No doubt that is not repeated in Part II. (B), but the third ground, that the renewal of the licence would be void, includes it. The licensing justices therefore had jurisdiction to refuse the renewal, and the Court will not grant the mandamus. [The Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 44 (now repealed), and *Reg.* v. *Farquhar* (1) were referred to.]

[He was stopped.]

Bruce Williamson (*Hugo Young, K.C.*, with him), in support of the rule. It is not contended that the renewal of a licence is not included in both branches of s. 34 of the Licensing (Consolidation) Act, 1910. That section, however, only applies to disqualified persons and disqualified premises. The Act draws a clear distinction between premises which are disqualified and premises which are not qualified to receive a licence. Sect. 35 defines disqualified persons, and the disqualifications therein specified, except that caused by the holding of an office, all point to some act, such as a conviction or finding of a Court, creating the disqualification. Sect. 36 gives a definition, which is exhaustive, of disqualified premises, and the disqualification there must also be created by some act of a character similar to that in the case of disqualified persons. The definition does not include premises whose annual value is less than that required by the

(1) (1874) L. R. 9 Q. B. 258.

Act. Sect. 34 refers to disqualified persons and disqualified premises as so defined. Sect. 37 deals with premises which are "not qualified" to receive a licence, sub-s. 1 (*b*) requiring the premises to be of the annual value set out in Sched. V., Part I., of the Act. That section does not say that a licence attached to premises which are not so qualified shall be void. The premises in the present case are not "disqualified premises" within the meaning of s. 34. By s. 18, in the case of an old on-licence as defined in Sched. II., Part I., namely, a justices' on-licence which was in force on August 15, 1904, the licensing justices have only power to refuse the renewal upon one of the grounds specified in Part II. of that schedule. Part II. (A) deals with old on beer-house licences, and one of the grounds upon which the licensing justices can refuse the renewal is expressly stated to be that the house is not qualified as by law required. Part II. (B) deals with old on-licences other than old beer-house licences, and the above-mentioned ground that the house is not duly qualified is not one of the grounds specified. The third ground specified, that "the renewal of the licence would be void," is satisfied by ss. 35 and 36. The licensing justices therefore, whose jurisdiction is purely statutory, had no jurisdiction to refuse the renewal of the licence upon the ground that the premises had ceased to be of the required annual value. When it was proved that the premises were not of the required value, the licensing justices ought under s. 19 to have referred the question of renewal to the compensation authority, who would probably have refused the renewal subject to the payment of compensation. If the contention that the licence is void because the premises are not of the required value is correct, then it follows that, if by inadvertence a licence is granted or a licence is renewed in respect of premises which are not of the required value, the person holding the licence might be prosecuted for selling intoxicating liquor without a licence. Such a result could not have been intended by the Legislature.

[AVORY J. The answer to that may be that it must be assumed that the licensing justices were satisfied before granting the licence in the first instance or renewing it that in fact the premises were of the required annual value.]

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It would be extremely hard upon a licensee if a fall in the value of houses caused by a change in the character of the district rendered his licence void. The Court will not give that construction to s. 37. The renewal of the licence therefore would not have been void. That being so, the licensing justices had no jurisdiction to refuse the renewal.

RIDLEY J. In my opinion this rule must be discharged. The question arises with regard to an old on-licence which the licensing justices have declined to renew upon the ground that the premises in respect of which the licence had been granted were not of the annual value required by Sched. V., Part I., to the Licensing (Consolidation) Act, 1910, namely, 50*l.*, and that therefore the licence if renewed would be void. It is contended in support of the rule that, although the premises do not in point of fact come up to the value required by the schedule, they are not "disqualified premises" within the meaning of s. 34, that therefore the licence if renewed would not be void, and that the licensing justices were not entitled to refuse the renewal. Sect. 34 provides that "a justices' licence shall not be granted, whether as a new licence or by way of renewal or transfer, to any person who is a disqualified person . . . . and a justices' licence shall not be granted in respect of or removed to any premises which by virtue of this Act are disqualified premises during the continuance of the disqualification, and a justices' licence held by a person so disqualified or attached to premises so disqualified shall be void." It was contended, as I understand, when the rule was moved that the words in the second branch of the section, "a justices' licence shall not be granted," did not include the case of the renewal of a licence, but that contention is not now relied upon. The contention now is that the section does not apply to licensed premises which, by reason of their annual value falling below the required standard, have become not qualified to receive a licence, and that it only applies to premises which have become disqualified in the sense of being rendered incompetent to receive a licence by some act, such as a conviction for an offence committed thereon. In order to see what is the meaning of the section it is necessary to consider

ss. 36 and 37. Sect. 36 says that "premises are disqualified premises for the purposes of this Act . . . . (2.) If by virtue of any other Act a justices' licence cannot be granted in respect of those premises." That includes in the phrase "disqualified premises" premises which by virtue of any other Act cannot receive a justices' licence. That seems to refer, as stated in Williamson's Law of Licensing, 4th ed., p. 465, to such cases as s. 10 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), which provides that, where two convictions under that section have taken place within a period of three years in respect of the same premises, the Court shall direct that for a term not exceeding one year "no such licence as aforesaid shall be granted to any person whatever in respect of such premises; and any licence granted in contravention of this section shall be void." I do not think, however, that s. 36 means to give an exhaustive definition of what are "disqualified premises." One must look further and see whether there is any other disqualification for the premises. Sect. 37 provides that "premises shall not be qualified to receive a justices' on-licence unless . . . . (*b*) the premises are of the required annual value as set out in Part I. of the Fifth Schedule to this Act." It seems to me that it is difficult to make a distinction between premises which are not qualified and premises which are disqualified. Premises which fail to fulfil the requirement of the Act as to value are just as much "disqualified premises" as premises in respect of which there has been a conviction or order of a Court rendering them disqualified from receiving a licence. Both are disqualified premises within the meaning of the Act. I cannot accept the view that s. 36 is intended to be an exhaustive definition of disqualified premises. If that is the true view of ss. 36 and 37, it follows that, when s. 34 says that "a justices' licence attached to premises so disqualified shall be void," it includes premises which are disqualified both under the provisions of s. 36 and under the provisions of s. 37 and Sched. V., Part I.

That being so, the licensing justices had power under Sched. II., Part II. (B) (3.), to refuse the renewal of this licence upon the ground that the licence would be void, because the premises were not of the required annual value. A difficulty has been

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suggested as to what might happen in the case of licensing justices granting by inadvertence a licence in respect of premises not of the required annual value, and the licensee being prosecuted for selling intoxicating liquor without a licence upon the ground that the licence was void. That question may be left to be dealt with when it arises, but I may say now that the answer might well be that the licensing justices must be presumed to have found as a fact that the premises were of the required value, and that everything must be presumed to have been in order when the licence was granted or renewed. The licence in this case would have been void, and the mandamus cannot issue. The rule must therefore be discharged

PICKFORD J. I agree that the rule should be discharged.

AVORY J. I also am of opinion that the renewal of this licence, if it had been granted by the licensing justices, would have been void. Sect. 37 enacts that premises such as those in the present case are not qualified to receive a justices' on-licence. That appears to me to be only another way of saying that they are disqualified from receiving a licence—that they are in fact disqualified premises—and s. 34 says that a licence attached to premises which are disqualified shall be void. The licensing justices were entitled under Sched. II., Part II. (B) (3.), to refuse the renewal of the licence upon the ground that the renewal would be void, and that was the ground upon which the licensing justices acted. The controversy here is whether they were entitled to do that, or whether they ought not to have referred the matter to the compensation authority, who would have refused the renewal subject to the payment of compensation. I think that the licensing justices were entitled to act as they did, and the rule must be discharged.

Rule discharged.

Solicitors in support of rule: *Rollit, Sons & Hart, for Rollit & Co., Kingston-upon-Hull.*

Solicitors against rule: *Walmsley & Stansbury, for Geo. L. Shackles, Kingston-upon-Hull.*

W. F. B.

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Jan. 29, 30, 31;
Feb. 1, 27.

[1912 G. 689.]

Ferry—Disturbance—Ferry from Vill to Vill or Point to Point—Change of Circumstances.

Between the thirteenth and fifteenth centuries various grants were made by the Crown of the manor of Lothingland on the west side of the river Yare with (amongst other things) ferries belonging to the manor, and during that period the lords of the manor were exercising a right of ferry across the river Yare in respect of the vill or vills of Gorleston and Little Yarmouth or South Town in the manor of Gorleston, in the hundred or half hundred of Lothingland. A similar right was during this period exercised from the east bank by the bailiffs of Great Yarmouth. Since the beginning of the fifteenth century the lords of the manor of Lothingland received the tolls and exercised the ferriage rights from and to both sides of the river Yare.

For some time before 1834 the plaintiffs' predecessors in title carried persons across the river Yare only at a point described as the lower ferry. In 1829 and 1834 proceedings were taken against one Ebden by a predecessor in title of the plaintiffs for disturbing the ferry, and in those proceedings respectively 1*s.* damages and an interim injunction were awarded to the plaintiffs.

In 1834 a memorial was presented to a predecessor in title of the plaintiffs by occupiers and owners of property in Great Yarmouth and South Town requesting him as proprietor of the ferry to provide an additional ferry boat to ply in the river in the vicinity of the Armoury at South Town. Thereupon the plaintiffs' predecessors, in 1834, established another crossing place at a point known as the upper ferry and acquired land on each side of the river for the purpose of making landing places. Since that date the business of carrying across the river was carried on at those two places between the vill of Great Yarmouth on the east side of the river and the vill or vills of Gorleston and Little Yarmouth or South Town on the west. There were no other fixed landing places or ferry stations except those at the upper and lower ferries.

By several local statutes protection was given to the ferries of a nature more consistent with the existence of an exclusive right of ferrying between the above-mentioned vills than with a point to point ferry.

The plaintiffs relied upon the grants, user, proceedings, documents and statutes mentioned above as evidence of a prescriptive title to or alternatively of a lost grant of a vill to vill ferry, and as evidence that there had been a transfer of their original moiety of the ferry rights from the bailiffs of Yarmouth to the plaintiffs' predecessors in title.

In 1510 the manor of Gorleston was granted by Henry VIII. to E. Jerningham and his wife in tail with all franchises, &c., and from

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that time the right of ferry was exercised by Jerningham and his successors, and though the title of the plaintiffs was not strictly traced to this grant of the manor, it was probably the foundation of their title:—

Held, that the inference ought to be drawn that the grant to the plaintiffs' predecessors in title was a grant of a vill to vill ferry, and not merely a point to point ferry, whether it was derived from the grant of 1510 or from a lost grant.

Before 1867 the number of passengers carried was possibly substantial but probably not very great, but after that year it increased steadily and largely in consequence of alterations in the manner of carrying on the fishing industry and the increase in the number of ordinary visitors to Yarmouth:—

Held, that the alteration in the circumstances did not affect the plaintiffs' right to the vill to vill ferry.

The defendant regularly carried passengers, chiefly workmen, across the river. He did not always start from and arrive at the same spot, but as a rule he carried from and to practically the same part of a fish quay and the opposite bank within the limits of the plaintiffs' exclusive ferry and did practically a ferry business:—

Held, that the defendant by his acts had interfered with the plaintiffs' rights as owners of the vill to vill ferry.

Semble that even assuming the lower ferry to be only a point to point ferry, and that the upper ferry was entitled to no protection, the facts with regard to the change of circumstances did not shew that there was a different traffic within the principle of the decisions in *Newton* v. *Cubitt* (1862) 12 C. B. (N.S.) 32, and *Cowes District Council* v. *Southampton Steam Packet Co.* [1905] 2 K. B. 287, but shewed only an increase and development and alteration in the nature of the same traffic, and that as the places from and to which the defendant carried passengers were close to the plaintiffs' lower ferry the acts of the defendant constituted a disturbance of that ferry.

ACTION tried before Pickford J. without a jury.

The plaintiffs claimed (inter alia) (1.) a declaration that they and their predecessors in title were entitled to and possessed of the ferry or (alternatively) the ferries mentioned in their statement of claim; (2.) an injunction restraining the defendant, his servants and agents, from in any manner disturbing the ferry or (alternatively) the ferries to which the plaintiffs were so entitled as therein declared.

By their statement of claim the plaintiffs alleged that: "(1.) At all material times the plaintiffs and their predecessors in title were entitled to and possessed of an ancient ferry for the carriage of foot passengers and their goods across the river Yare, from South Town, otherwise Little Yarmouth, in the county of

Suffolk, to Great Yarmouth, in the county of Norfolk, and from Great Yarmouth aforesaid to South Town aforesaid, and of all profits, duties, commodities, emoluments and appurtenances whatsoever to the said ferry belonging or by the same arising or growing. (2.) The said ferry was, and is, an exclusive ferry over the said river from the manor or vills or hamlets or towns following, namely: Gorleston or South Town or Little Yarmouth, in the county of Suffolk, or one of them to the vill or town of Great Yarmouth, in the county of Norfolk, and vice versa, or alternatively was or is a ferry or ferries both ways across the said river at two points on the said river and known as 'the lower ferry' and 'the upper ferry,' and such ferry or ferries is or are a ferry or ferries (as the case may be) existing by virtue of a prescriptive title from time immemorial and whereof memory of man runneth not to the contrary or (alternatively) by virtue of a lost grant thereof from the Sovereign, and the plaintiffs or their said predecessors have in fact possessed and enjoyed the same from long before the time of living memory. (3.) The defendant wrongfully disturbed the plaintiffs in the possession of the said ferry or ferries by carrying divers foot passengers and their goods for hire across the said river within the limits of the plaintiffs' said exclusive ferry, or near to the said ferry or ferries of the plaintiffs. (4.) By reason of the said acts the plaintiffs lost the profits of their said ferry or ferries."

The statement of claim gave the following particulars of the defendant's acts of disturbance:—

"On Wednesday, June 8th, 1910, and on divers other days between the 8th and 15th June in the said year the defendant has frequently carried passengers across the said river Yare from Gorleston and Yarmouth aforesaid and vice versa from a spot in the vicinity of the gas house to the fish wharf opposite or vice versa. The defendant has also carried passengers across the said river between the same points on divers other days between the 14th and 18th days of June aforesaid.

"All the above ferriage by the defendant has been such as to disturb and infringe the rights of the plaintiffs in the said ferry or ferries."

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By his defence the defendant in substance denied the allegations contained in the statement of claim. He further alleged that the manor or vills or hamlets or towns of Gorleston and South Town and Little Yarmouth are not nor is either of them a vill or vills and the vill or town of Great Yarmouth is not a vill in the sense that an exclusive right of ferry between Gorleston, South Town or Little Yarmouth on one side of the said river and Great Yarmouth on the other side could have been validly granted or can be sustained in law, and alternatively that if he carried foot passengers and their goods for hire across the said river he did not thereby disturb the plaintiffs in the possession of the said ferry or ferries, but was accommodating a new and different traffic from that which was accommodated by the said ferry or ferries, that is to say, traffic arising out of the altered circumstances and new conditions created in the districts of Gorleston and South Town, and Little Yarmouth and Great Yarmouth, by the removal of the fishing industry from the beach of Great Yarmouth to the fish wharf erected on and near the banks of the river Yare, and by the development of the borough of Great Yarmouth on either side of the river, and the erection of houses, factories, and manufacturing works in Great Yarmouth and Gorleston, and South Town and Little Yarmouth, and by the great expansion of excursion traffic to the districts.

The action was tried at the Norfolk Assizes on January 29, 30, and 31 and February 1, when judgment was reserved.

At the trial it was proved that the defendant carried passengers across the river Yare between points on either side situated from 350 to 450 yards north of the plaintiffs' lower ferry. The additional facts which the plaintiffs established appear from the judgment.

P. O. Lawrence, K.C., and *A. H. Poyser*, for the plaintiffs. The plaintiffs have established their exclusive right to a vill to vill ferry either by the grant of 1510 or by virtue of a lost grant. The evidence in support of this consists in (1.) the evidence of user. The plaintiffs have uninterruptedly exercised their rights of ferriage at two points beyond living memory, namely, the

lower ferry and the upper ferry, and no one else has exercised any ferry rights within the limits claimed by the plaintiffs. This points conclusively to the right being a vill to vill ferry, and the evidence raises a strong presumption that it had a legal origin. The word "ferry" may mean the physical thing or it may mean ferry rights: *Huzzey* v. *Field*. (1) Every vill to vill ferry is in practice worked from and to some definite point or points within the limits of the ferry rights. It is not necessary that the owner of a ferry should own the land on each side: *Peter* v. *Kendal*. (2) The growth of the neighbourhood whereby its character becomes altered does not destroy the rights of ferry. The only persons who have ferried have been the ferry owners, who have been exclusively in possession, and it is clear from the judgments of Bowen L.J. and Lord Herschell in *Halliday* v. *Phillips* and *Phillips* v. *Halliday* (3) that every possible legal inference ought to be drawn in their favour.

The evidence of the witnesses called on behalf of the plaintiffs shews nearly 100 years' open enjoyment of their rights not of a point to point but of a vill to vill ferry, and whenever those rights were in danger they were maintained by the plaintiffs' predecessors. *Tripp* v. *Frank* (4) and *Pim* v. *Curell* (5) are cases in which vill to vill ferries were established.

(2.) The records relating to previous proceedings in which the rights of the plaintiffs' predecessors in title were contested and upheld, and the ancient and modern documents, contain strong evidence in favour of the plaintiffs' claim.

(3.) In all the local Acts of Parliament which have been obtained the ferry owners' rights have been recognized and preserved. The result of the evidence is that the plaintiffs have proved that there has been a transfer to the plaintiffs' predecessors in title of the moiety of the ferry rights originally owned and possessed by the bailiffs of Yarmouth, and that the plaintiffs are now owners of the whole vill to vill ferry.

If the plaintiffs are owners of a vill to vill ferry, the defendant has clearly infringed their rights, as he is ferrying within the

(1) (1835) 2 C. M. & R. 432.
(2) (1827) 6 B. & C. 703.
(3) (1889) 23 Q. B. D. 48; [1891] A. C. 228.
(4) (1792) 4 T. R. 666.
(5) (1840) 6 M. & W. 234.

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limits of their ferry. But even if the plaintiffs are only entitled to a point to point ferry at the lower ferry, the defendant's acts constitute a disturbance of such ferry, as he is carrying passengers who would otherwise cross the river by the plaintiffs' ferry, and he has not shewn that he is carrying a different traffic from that for the service of which the plaintiffs' rights were granted, and upon this ground *Newton* v. *Cubitt* (1) and *Cowes District Council* v. *Southampton Steam Packet Co.* (2) are distinguishable. In *Newton* v. *Cubitt* (1) a new highway was established on the land and new and different traffic sprang up owing to the new highway. The decision in *Cowes District Council* v. *Southampton Steam Packet Co.* (2) is difficult to understand and there are passages in the judgment which appear to be inconsistent, and it is distinguishable from the present case, as in that case the new traffic was different from that dealt with by the then plaintiffs.

Ernest Wild, K.C., and *Claughton Scott*, for the defendant. There is no evidence that the defendant carried persons on the plaintiffs' line of traffic. The interim injunction granted by the Court of Chancery in *Anguish* v. *Ebden* (3) is not evidence as against the defendant, nor is the judgment in the action tried at the Suffolk Assizes in 1829 (4) conclusive as to the nature of the right claimed by the then plaintiff. The present case is covered by the decision in *Cowes District Council* v. *Southampton Steam Packet Co.* (2), for the new traffic which has come into existence is a different kind of traffic. It is more distinctly different from the old traffic than that which was brought into existence by the new highway in the *Cowes Case.* (2)

There is a strong presumption in law in favour of a point to point ferry rather than a vill to vill ferry. Grants by the Crown must be construed most favourably to the Crown.

The districts of Gorleston and Little Yarmouth or South Town are not sufficiently defined for a vill to vill ferry to exist between them and Great Yarmouth. Even if it were admitted that the plaintiffs have established a point to point ferry at the lower ferry, there is no evidence of any larger rights of ferry. A vill

(1) 12 C. B. (N.S.) 32.
(2) [1905] 2 K. B. 287.
(3) (1834) vide post, p. 449.
(4) Vide post, p. 449.

to vill ferry must be restricted by the nature of the user at the time of the grant. A grant of a vill to vill ferry only conveys the right to carry the traffic which exists at the time of the grant.

There has been such a change in the circumstances that the defendant is warranted in exercising any right to convey passengers which could not have been included in the original grant to the plaintiffs if there was any. If new traffic has come into existence it cannot be presumed that the new traffic was contemplated in the grant. [*Hopkins* v. *Great Northern Ry. Co.*(1), *Londonderry Bridge Commissioners* v. *M'Keever* (2), and *Churchman* v. *Tunstal* (3) (the decision appears to have been subsequently overruled by Lord Hale (4)) were also referred to.]

P. O. Lawrence, K.C., replied.

Cur. adv. vult.

Feb. 27. The following judgment was read by

PICKFORD J. In this case the plaintiffs seek to restrain the defendant from interfering with their rights of ferry across the river Yare from Great Yarmouth to Gorleston and Little Yarmouth or South Town.

Their cause of action is alleged in two forms.

First, the plaintiffs allege that they have an exclusive right of ferry between the vill of Great Yarmouth on the east side of the river and the vill or vills of Gorleston and Little Yarmouth or South Town on the west, or what is called a vill to vill ferry.

There is no doubt that the defendant has carried passengers across the river from Great Yarmouth to Gorleston or South Town, and therefore, unless he can shew some justification for doing so, he has interfered with this right if it be established.

In the alternative the plaintiffs allege that, even if their right be not an exclusive right of ferry between the vills on either bank of the river, they have a right of ferry at a point known as the lower ferry, and that the defendant's acts are a disturbance of that right.

The defendant does not contest the plaintiffs' right to what is

(1) (1877) 2 Q. B. D. 224.
(2) (1891) 27 L. R. Ir. 464.
(3) (1659) Hardres, 162.
(4) See per Lord Abinger C.B. in *Huzzey* v. *Field*, 2 C. M. & R. 432, at pp. 440, 441.

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called a point to point ferry at that place, but he denies that his acts are a disturbance of that right.

During living memory the facts seem to be as follows:

Before 1834 the plaintiffs' predecessors in title carried persons across the river at the point described as the lower ferry. In 1834 they established another crossing place at what is described as the upper ferry, and acquired land on each side of the river for the purpose of making landing places.

Since that date the business of carrying passengers across the river has been carried on at those two places, and there are no other fixed landing places or ferry stations except those at the upper and lower ferry.

A third ferry was mentioned as Queen's Ferry. It is near the entrance to the haven, and the only evidence I have about it is that it was used by public officials to carry articles to a fort on the west side. I do not therefore think that it is relevant to this case.

Before 1867 the number of passengers carried was possibly substantial, but probably not very great, but after that year it increased steadily and largely in consequence mainly of alterations in the manner of carrying on the fishing industry.

Before 1867 the herring fishery was carried on by sailing drifters or trawlers which discharged their fish on the jetty or beach on the east side of the town facing the sea, and the regular method of treating the fish was by smoking.

In 1867 the present fish wharf was constructed on the east bank of the river on a site which up to then had been bare sands or denes, and in consequence the landing of the fish was transferred from the sea side of the town to the river side.

Soon afterwards the present system of treating fish by pickling was introduced, and a few years later steam drifters were introduced and have now entirely superseded the old sailing boats.

The result of these changes has been that the river banks have been substituted for the beach as the site of the fishing industry, that large pickling establishments have been provided for the pickling of the fish, and engineering and ship repairing works have also been erected for the use of the steamers. Many houses have also been built both in Great Yarmouth and Gorleston.

There is also a great deal more traffic in the river, as the steam drifters can come in and out much more quickly than the old sailing boats.

In consequence Yarmouth has developed and increased in population enormously, and the amount of fish taken and the number of persons concerned in the trade have also very largely increased.

In addition to the permanent population, a very large number (several thousands) of Scotch men and girls come to Yarmouth in the fishing season for the pickling, which is peculiarly a Scotch industry, and many other persons are also attracted there by purposes connected with the fish trade.

The number of ordinary visitors to Yarmouth has also very largely increased.

A very much larger number of persons now cross the river, and as fishing boats lie on both sides and there are works on both sides, persons who have business with fishing boats or with works on the opposite side of the river to the site of their places of business, and workmen who live on the opposite side to that on which they work, have to cross the river on many occasions, in some cases several times a day. Before the transfer of the fishing industry to the banks of the river there was little or no crossing of this description.

During all this time there have been boatmen plying about the river ready to do any work which they could get, such as running ropes, &c., and they have from time to time carried persons from one side of the river to a boat lying in the stream or at the opposite bank, and sometimes from one bank of the river to the other. They have no doubt done more of this carrying of people since the great development of the fishing trade.

I am, however, satisfied that the greater part of the people so carried were carried from one side of the river to a boat in the river, though she might be lying against the wharf on the opposite bank; that at any rate with the one exception in 1829 mentioned later none of these boatmen before the defendant were doing anything like a continuous running from bank to bank for the purpose of acting as a ferry, and that they

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never claimed any right to make a charge for carrying from bank to bank or did so. Several firms which employed a number of workmen acquired boats of their own for the purpose of carrying their men across the river, and a good deal of the defendant's evidence came from these persons. The plaintiffs do not claim to interfere with any one using boats in this way for their own men. I am satisfied that such payments as these boatmen got were not considered by them or those who made them as payments of any charge which they had a right to make for ferriage across the river. The money was very commonly left on the thwart of the boat, or the boatman rewarded with a drink or a present after carrying the passenger several times, and these facts point to the conclusion that no right to charge was claimed.

The evidence satisfies me that what the defendant has done is something quite different. He has been regularly carrying passengers, chiefly workmen, across the river from the fish wharf to the other side of the river near the gas works. As fishing boats lie at the wharf and there are no regular landing places on either side, he naturally does not always start from and arrive at the same spot, but I am satisfied that as a rule he carries from and to practically the same part of the fish quay and the opposite bank, and that he is doing and claiming to do practically a ferry business. This in my opinion quite distinguishes his acts from those of the other boatmen, and the question for decision is whether those acts are a disturbance of one or both of the plaintiffs' ferries.

It is, as I have already said, not disputed that the lower ferry is an ancient ferry from point to point, but the defendant alleges that the upper ferry is not an ancient ferry, that the plaintiffs are not entitled to any rights in respect of it as it was only established in 1834 without any grant or authority from any one.

The plaintiffs on the other hand contend that the upper ferry was established by virtue of the exclusive right existing in the plaintiffs of carrying passengers across from Great Yarmouth to Gorleston or South Town and is in fact not a second ferry at all, but only a carrying on of the same exclusive right of ferry at a different place.

This exclusive right is, as I have said, claimed as what is called a vill to vill ferry from the vill of Great Yarmouth to the vill or vills of Gorleston and Little Yarmouth or South Town, and reference was made to many old documents in support of this claim.

I am satisfied from them and the evidence that there was a vill of Great Yarmouth, that there was either one vill of Gorleston and Little Yarmouth together or two vills of Gorleston and Little Yarmouth separately, that this vill or these vills were within the manor of Gorleston, and that the manor of Gorleston was within the hundred or half hundred of Lothingland. I find the lord of Lothingland on many occasions asserting the rights of Gorleston and Little Yarmouth against Great Yarmouth.

It appears from two documents of the time of Henry III. (1) that the manors of Luddingland and Torkesey were granted to John Baliol and Devorguilla his wife with (amongst other things) ferries and all appurtenances to the manors in any way belonging within vills and without as well on land as on water as fully as the King had them when the said vills were in his hand.

In 1331 the half hundred of Luddingland which had been granted to John Baliol and his wife had again come into the hands of the Crown and was granted by Edward III. (2) to the Countess of Pembroke for her life, and by an inquisition taken

(1) Patent Roll. 22 Henry III. Membrane 11.

[Abstract.]

11 December 1237.

Grant by the King to John de Baliol and Derforguill his wife, of the manors of Luddingland and Thorkese, with the farm of the vill of Gernemuth with their appurtenances, except advowsons of abbeys and priores . . . .

[Abstract.]

Temp. Henry III.

Writ of King Henry III., in regard to the manor of Torkesey (Thorkese), in which he recites that he had granted Lothingland, etc. to John de Baliol and his wife, with, inter alia, all ferries, etc.

(2) Patent Roll. 5 Edward III. Part I. Membrane 1

[Abstract.]

5 May 1331.

Licence for John de Brittania, Earl of Richmond, and grant, for life, to Mary de St. Paul, Countess of Pembroke inter alia, the half hundred of Ludingland, formerly held by John de Balliol, and granted to the said Earl by the late King.

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after her death (1) it was found that the passage of Little Yarmouth was worth to her 20*s*. In an account furnished in 1391 by the collectors of rents of the manor of Gorleston they charge themselves with 40*s*. for the farm of the ferry over the water of Gorleston up to Easter and 4*l*. for the farm of the same ferry after Easter.

The manor was granted in 1390 to Queen Anne of Bohemia for her life (2), and I have no record of it after that till 1509, but in the meantime it had come into the hands of the de la Poles as appears from documents of that date. In a document of the fourteenth century (3) stating the profits which the ancestors of the

(1) Inquisitions Post Mortem. 51 Edward III. 1st Numbers. No. 28.

[Abstract.]

A.D. 1377.

Inquisition taken at Lowystoft, in the county of Suffolk, on Friday after the feast of St. George, 51 Edward III. (A.D. 1377).

The jurors say upon their oath that Mary de St. Paul late Countess of Pembroke . . . . held for term of her life, by grant of the now King, the manor of Lowystoft, reversion thereof pertaining to the said King and his heirs for ever. . . . . Also there is there of faldage and (*sic*) Gorleston and elsewhere worth yearly 7*s*. 8*d*.; also from certain fines and rents of . . . . 10*l*. 12*s*. 0*d*. payable at certain terms. Also they say that the ferry ("Passagium") of Little Yarmouth is worth yearly 20*s*. . . . . Also they say that the same Mary held, in form aforesaid, the hundred of Luddyngland, worth yearly, with a certain leet pertaining to the said hundred, 15*l*. 6*s*. 9*d*. The said Mary died on Monday next before the feast of St. Gregory the Pope last past. They do not know who is her next heir.

(2) Patent Roll. 13 Richard II. Part 3. Membrane 20.

[Abstract.]

11 March 1390.

Grant to Queen Anne for life that she may hold the manor and lordship of Lowestoft and hundred of Luddyngland granted to her on 12 November last, with all franchises, etc., as she has elsewhere in England.

(No particulars set out.)

(3) Ancient Petitions. Exchequer Series. E. No. 1143.

(Translation of office copy.)

(14th century)

These are the profits which the ancestors of our lord the King were accustomed to take in the vills of Little Yarmouth and Gorleston, when the manor was in their hands, and also (those which) the other lords have taken, who held the said manor of our said lord the King namely: of each fishing boat of a stranger, anchored towards the parts of Luddingland, 18*d*., and of each English fishing boat, excepting boats of the franchise, 8*d*. or 6*d*., or 4*d*., according to the size of the boat, and for each last of the red herrings belonging to merchants other than of the franchise, 4*d*., ... and for the ferriage of the moiety of the haven, 40*s*., and also the receiving of plaints and making attachments

King and the other lords who held the manor of Gorleston were accustomed to take in the vills of Little Yarmouth and Gorleston there is included for the ferriage of the moiety of the haven 40*s*.

It seems therefore clear that the lords of the manor were during all this time exercising a right of ferry in respect of that vill or those vills of Gorleston and Little Yarmouth, and it is stated to be for the ferriage of a moiety of the haven because a similar right was exercised in respect of ferriage from the other bank by the bailiffs of Great Yarmouth. This appears from memoranda and receipts from 1309 down to the early years of the next century.

At first there is no mention of more than one ferry, but at the end of the fourteenth century two are mentioned, one being called the horse ferry, and although it is difficult to be certain it seems probable that there was a horse ferry at that time about the site of the present lower ferry and a foot ferry about the site of the present bridge.

However that may be, it seems fairly clear that at some time in the fourteenth century a second crossing place was established by Great Yarmouth on the one side and Gorleston and Little Yarmouth on the other, and there is no evidence in the documents of any authority to establish it, unless such authority can be inferred from the right of ferriage from the vills conferred on the lords of the manor on each side.

This continued to be the state of things until 1417, when Henry V. granted a licence (1) to the burgesses of Great Yarmouth to build a bridge across the river at a place about the same as the then upper foot ferry. One of the grounds stated in

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as far as the thread of the water, and also all kinds of profits arising from these [things], and also of continuing a fair during the fishery throughout the season between St. Michael and the feast of St. Martin, of all the things aforesaid, and likewise moreover throughout the year a market every week on Thursday within the franchise which pertains to the vills aforesaid. [Endorsed.]

It is drawn up upon peace between those of Great Yarmouth and Little Yarmouth before the Bishop of Norwich. Therefore let it be before him, etc.

(1) Patent Roll. (Chancery.) 5 Henry the Fifth. Membrane 19.

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the petition for this licence was that the bailiffs of Great Yarmouth would not allow persons bringing victuals, &c., to cross the river free by the ferry and that such persons could not cross for the purpose in their own boats because they had to draw them up to the shore and then the bailiffs charged toll upon them. This seems to shew an assertion of a right to charge for crossing and landing anywhere on the Great Yarmouth side.

The bridge was soon afterwards built, and from that time down to the present there is no trace of any charge made by the Corporation of Great Yarmouth for crossing the river with the exception of a temporary payment under the decree of the Star Chamber, to be mentioned later, but the lords of the manor of Gorleston made ferry charges upon persons crossing from either one or the other side of the river at the lower ferry.

The plaintiffs do not claim title under any of the grants I have mentioned, and they are only relevant as shewing, when considered together with the user, how the ferry was dealt with in ancient times.

In 1509 in consequence of the attainder of Edmund de la Pole the manor of Gorleston was again in the hands of the Crown, and on June 14 of that year was granted by Henry VIII. to E. Jerningham and his wife for life. (1) In 1510 the same Sovereign granted the manor to them in tail. (2)

(1) Patent Roll. Henry VIII. Part 2. Membrane 14.

(2) Patent Roll. 2 Henry VIII. Part 2. Membrane 16.

(Translation.)

28 January (A.D. 1510—11).

THE KING (after reciting the grant of the 14th of June, 1509, and the fact that Edward Jernyngham and Mary, his wife, had delivered the said grant to be cancelled, and also the good services done by said Edward) gives and grants to the said Edward and Mary the manors of Lowestoft otherwise called Leystoft, ... Northlete, Southlete, Gorleston, ... with all and singular their appurtenances, in the county of Suffolk, and the hundreds of Lothyngland and Mutford, with all and singular their appurtenances, in the aforesaid county, and all issues, profits and perquisites of Courts from and in the aforesaid manors and hundreds, with their appurtenances; and also all . . . . liberties, privileges, advantages . . . . and commodities whatsoever to the said manors and hundreds, or any of them, in any wise belonging or appertaining; . . . . To HAVE, HOLD AND ENJOY the aforesaid manors and hundreds, and all and singular other the premises, and the issues and profits of the same, with all and singular their appurtenances, to the aforenamed Edward and Mary, and the heirs male of the bodies of

I mention this grant for two reasons. First, although the title of the plaintiffs is not strictly traced to it, I think it is probably the foundation of their title. If it be not, then upon the evidence before me the title depends on a lost grant.

Secondly, it was pointed out to me that this grant is mentioned in Suckling's History of Suffolk, p. 367, as a grant of the ferry "as it hath been used and now is," and it was contended by the defendant that this shewed a more restricted right to the ferry than that claimed by the plaintiffs.

The authority for the statement in Suckling is stated to be the court rolls. They were not produced, but I have seen the grant and it contains no such words as those mentioned.

It does not specifically mention the ferry at all, but grants the manor with all franchises, &c., and from that time the right of ferry was exercised by Jerningham and his successors.

With the exception of these grants, from 1417 to 1570 no documents were produced before me at all relating to the matter, and it is therefore difficult to be certain as to what took place, but from the earlier and subsequent history I infer that after the building of the bridge, horse and vehicular traffic passed over the bridge, and the lower ferry ceased to be required for a horse ferry and was worked by the lord of the manor of Gorleston as a foot ferry.

In 1570 the bridge was destroyed by being blown down, and therefore no one could cross by it, and the Corporation of Yarmouth resolved that a good boat or keel should be provided to ferry over horses and persons at that site.

Disputes at once arose between them and Sir Henry Jerningham (called Jernegan), the lord of the manor of Gorleston.

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the same Edward and Mary lawfully begotten . . . .

AND MOREOVER we, of our more ample grace, have given and granted, and do give and grant for us and our heirs, by these presents, to the aforenamed Edward and Mary, and the heirs male of their bodies lawfully begotten, that they shall have and enjoy . . . . all and all manner of . . . . liberties, franchises and privileges whatsoever in the said manors and hundreds, and any of them, and in other the premises, with the appurtenances, ... before this time or hereafter due belonging or appertaining, without any account or any other thing therefor to us, our heirs or successors, to be rendered or paid . . . .

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There were many disputes between them, but so far as the ferry is concerned it appears that Sir Henry Jerningham claimed a ferry at the bridge, that the lower ferry began to be used for horses, and that the Corporation of Great Yarmouth objected, for they gave instructions that horses ferried over from Gorleston should be impounded. It is not certain that this order refers to the lower ferry, but it is probable that it does, because the corporation themselves proposed to ferry horses over at the site of the bridge.

Negotiations took place for a reference of the disputes to arbitration, but eventually proceedings were begun in the Star Chamber and the matter was referred to Sir Christopher Heydon and Sir William Butts.

These gentlemen made their award, and it was made part of the decree of the Star Chamber.

This decree has been much relied upon by both sides, but it does not seem to me to be of very great importance.

It was not a grant of rights, nor was it a determination of the extent of the grant of ferry rights. It was only a determination of certain disputes which had arisen between the parties, and so far as the ferry was concerned those seem to me to have consisted of a dispute as to the claim of Sir Henry Jerningham to a ferry at the bridge and a dispute as to his carrying horses at the lower ferry which had become a foot ferry.

By articles V. and VI. of the decree (1) it was decided that until

(1) Records of the Corporation of Yarmouth (printed in Swinden's History of Yarmouth, pp. 292, etc.).

Exemplification of a Decree etc. in the Star Chamber.

A.D. 1572.

. . . . .

V.

ITEM, that during such time as the bridge, called Yarmouth Bridge, shall happen to be in decay, whereby it shall be needful to use ferriage for people over the water, that then, and so long untill the bridge be renewed, it shall be lawful for Sir Henry Jernegan, and his heirs, to use and take the profit of the ferriage for all persons coming towards Yarmouth; and likewise the town of Yarmouth to have like commodity of ferriage for all that shall pass over the water at Yarmouth. And that for the want of boats, on either part, the one to supply, in the want or absence of the other, on either side.

VI.

ITEM, Sir Henry, and his heirs, shall enjoy their foot ferry over against Gorleston for ever, as hath been used, and now is.

the bridge was rebuilt the two parties should divide the ferriage at the bridge and that Sir Henry and his heirs should enjoy their foot ferry over against Gorleston for ever as had been used and then was.

It has been argued that this clause shews that Sir Henry Jerningham never had any more extensive right than that of a foot ferry from point to point at that spot, but I do not think that it establishes that contention. It was a mere determination of the disputes which had arisen between the parties under the circumstances, and if Sir Henry Jerningham had no rights except in respect of this lower ferry I do not see why he was given part of the receipts from the temporary ferry at the site of the bridge.

The payments made under this decree during the rebuilding of the bridge are the last payments that can be traced as having been made to Great Yarmouth for ferriage, and as the lords of the manor of Gorleston continued from the beginning of living memory to the present time to charge for ferriage from both sides, I cannot help inferring that in some way the rights of Great Yarmouth to charge for their moiety were transferred to Gorleston. The ferry is referred to in conveyances and similar documents after this, but not in my opinion in such a way as to throw any light on the question.

The next matter of any importance seems to have occurred in 1829, when proceedings were taken by the Reverend George Anguish against a man of the name of Ebden, who was alleged by the plaintiffs' predecessor in title to have disturbed his ferry much in the same way as the defendant is alleged here to have disturbed the plaintiffs' rights.

The action *Anguish* v. *Ebden* (1) was tried at the Suffolk Assizes in January, 1829, before Parke J. and a special jury and resulted in a verdict for the plaintiff for 1*s*., but I do not think the record in that action is conclusive as to the nature of the right of ferry claimed by the then plaintiff, as I think it is consistent with either a right of vill to vill or of point to point ferry.

Proceedings were taken in Chancery by the same plaintiff in 1834 for an injunction to restrain Ebden from repeating the

(1) Not reported.

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acts complained of, but as they never went further than an interim injunction they are of no importance.

In the same year, 1834, a memorial was presented to the plaintiffs' predecessor in title by occupiers and owners of property in Great Yarmouth and South Town requesting him as proprietor of the ferry to provide an additional ferry boat to ply in the said river in the vicinity of the Armoury at South Town, and he did provide boats and landing places at the site of the upper ferry now existing.

Unless this was done under the powers of the original grant there is no authority for it and this upper ferry has no right to protection.

By s. 67 of the Yarmouth Haven Act of 1835 (1) penalties are imposed on any one obstructing this ferry, but the provision is not extended to the lower ferry. Why this distinction is made I cannot tell, but it does not seem likely that statutory protection would be given to a ferry in respect of which no rights existed.

By the Great Yarmouth Fish Wharves Act, 1866 (2), s. 33, powers are conferred on the corporation to acquire both ferries, but they are prohibited from taking one without the other.

By s. 27, sub-s. 1, of the Great Yarmouth Corporation Act,

(1) Yarmouth Haven Act, 1835 (5 & 6 Will. 4, c. xlix.), s. 67: "In case the master or other person having the rule or command of any vessel shall at any time lay or moor such vessel, or shall suffer such vessel to lie, in such a situation within the said haven as to impede or obstruct the ferry lately established by the Reverend George Anguish across the said haven from the quay at Great Yarmouth aforesaid to the hamlet of South Town, or in any manner to prevent the direct passage of the ferry boats over the said haven between the stations set apart for the landing of passengers in Great Yarmouth and South Town respectively, such master or other person so offending shall forfeit and pay any sum not exceeding five pounds for every such offence."

(2) Great Yarmouth Fish Wharves Act, 1866 (29 & 30 Vict. c. cclxiii.), s. 33: "For the purposes of the several works by this Act authorised to be made and maintained by the corporation, the corporation may from time to time enter upon, take, and use such of the lands shown on the deposited plans and specified in the deposited books of reference as may be requisite, and may purchase, take, and use the ferries over the haven called the 'North and South Ferries': provided that the corporation shall not purchase, take, or use one of such ferries unless the corporation purchase both of such ferries."

1904 (1), these powers are reconferred, and by sub-s. 2 a power is given to the corporation to establish new ferries, but it is provided that they shall not establish any new ferry unless and until they shall have purchased the existing ferries under the powers of sub-s. 1.

As far as I can ascertain, these documents and Acts of Parliament together with the user within living memory before mentioned, represent the history of the ferry rights so far as they can be traced.

It is difficult to speak with certainty about matters which involve the examination of transactions which occurred so long ago, but on the whole I have come to the conclusion that I ought to infer that the grant was a grant of exclusive ferriage rights between the vills on each side of the river or what is called a vill to vill ferry—not merely a point to point ferry.

I am led to that conclusion mainly by these considerations: the grants to those who held the manor of Gorleston within the half hundred of Lothingland were not grants of ferries alone, but of the manor with amongst other things all ferries, tolls, courts, &c., or with all franchises, &c. The document of the fourteenth century to which I have referred speaks of the rights of all who held from the King as the same and I infer them to have been so. Such words do not seem to me to be apt to

(1) Great Yarmouth Corporation Act, 1904 (4 Edw. 7, c. ccviii.), s. 27: "The corporation may—

"(1.) Purchase take and use the ferries over the haven called respectively the 'North Ferry' and 'the South Ferry' together with the property (real and personal) rights powers and privileges held or enjoyed by the owners of those ferries respectively for the purposes thereof and the provisions of the Lands Clauses Acts incorporated with this Act shall so far as applicable extend and apply to the purchase and taking of such ferries property rights powers and privileges as if the same were lands within the meaning of those Acts Provided that the corporation shall not purchase take or use one of such ferries unless they purchase both of such ferries:

"(2.) Establish a new ferry or ferries across the haven at such point or points as they may deem expedient and as the commissioners may approve (which approval shall not be unreasonably withheld) Provided that the corporation shall not establish any new ferry across the haven unless and until they shall have purchased the North Ferry and the South Ferry under the foregoing provisions of this section."

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express a grant to the lord of a right of ferry only at one point. The grant of 1510, as I have said, does not specifically mention the ferry, but only the manor and franchises with other general words, but the user continued the same, and I should therefore construe this grant as granting the ferry and not being narrower than the early ones.

Then for 600 years there is no trace of any right of ferry being exercised by any one except the lords of the manor of Great Yarmouth and Little Yarmouth and Gorleston, and, as I have said, I infer that the rights of the former have been transferred to the latter. On two occasions, one of uncertain date, about 500 years ago, and one nearly eighty years ago, additional ferries have been established by those lords, and although of course a ferry may be established without a grant so long as it does not interfere with an existing right of ferry, it seems to me more reasonable to infer that they were established by virtue of such a grant as that of an exclusive vill to vill ferry. The latter new ferry established in 1834 was so established in consequence of a request to the plaintiffs' predecessor in title as owner of the ferry, and this seems to suggest a recognition of his rights.

No attempt has been made to interfere with the ferries owned by the lords of the manor before this case except in the case of Ebden in 1829, for, as I have already said, I do not consider that the acts of the boatmen who plied on the river asserted or were meant to assert a right to interfere with the plaintiffs' ferry. The verdict and judgment in the action against Ebden and the protection given to the ferries by the Acts of 1835, 1866, and 1904, though they can possibly be referred to a point to point ferry, are in my opinion more consistent with a vill to vill ferry.

For these reasons mainly I come to the conclusion that such an exclusive right of ferrying between the vills on either side of the river exists whether it be derived from the grant of 1510 or from a lost grant.

If this be so, then the defendant by his acts in my opinion clearly has interfered with such rights and an injunction should be granted.

I do not think the alteration in the circumstances mentioned before affects the plaintiffs' right if it be that of a vill to vill ferry.

I think it well, however, to express my opinion on the other point raised, i.e., whether, assuming the lower ferry to be only a point to point ferry and the upper to be entitled to no protection, the acts of the defendant constitute a disturbance of it.

Prima facie they certainly do, for I accept the evidence that a large proportion of the workmen who live in Gorleston and cross from and to Yarmouth for their work live in parts of Gorleston which oblige them to pass either immediately by or close to the ferry in order to reach the defendant's boat and that they have at times been seen to do so.

It is, however, contended on behalf of the defendant that his acts do not constitute such a disturbance, and to support this contention evidence was given of the inadequacy of the plaintiffs' ferry accommodation and of the great changes in size and place of trade in Yarmouth and cross river traffic which I have already mentioned.

In the first place inadequacy of a ferry is no defence for a disturbance but only ground for a revocation of the franchise, but I am also satisfied that much of the evidence on this point was very exaggerated. I do not think it necessary to consider whether the plaintiffs might not much improve their service, but I am sure that, if the opinions expressed by some of the defendant's witnesses were correct, the Corporation of Great Yarmouth would have taken some steps to exercise the powers conferred on them by the Act of 1904. If, however, the defendant can establish that he is serving a different traffic from that for the service of which the plaintiffs' ferry rights were granted within the principle of the cases of *Newton* v. *Cubitt* (1) and *Cowes District Council* v. *Southampton Steam Packet Co.* (2), then he succeeds in shewing that his acts are not a disturbance.

I do not think that the facts which I have mentioned with regard to this point do establish this. I think that they do not shew that there is a different traffic within the meaning of those cases, but only an increase and development and alteration in the nature of

(1) 12 C. B. (N.S.) 32. (2) [1905] 2 K. B. 287.

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the same traffic, and that therefore the defendant's defence fails even if the plaintiffs have only a point to point ferry.

I am of opinion therefore that the injunction and a declaration should be granted as prayed, with costs.

Judgment for plaintiffs. (1)

Solicitors for plaintiffs: *Morris & Bristow, for Harmer, Ruddock & Son, Great Yarmouth.*

Solicitors for defendant: *Dubois & Co., for Chamberlin, Talbot & Bracey, Great Yarmouth.*

(1) The following is the form (omitting formal parts, recitals, and so much as related to costs) in which the judgment was drawn up:—"It is therefore this day adjudged and declared that the plaintiff company as owners of the ancient ferry in the pleadings mentioned are entitled to the exclusive right of carrying foot passengers and their goods across the river Yare from and to the vill (or vills) of Gorleston and Little Yarmouth or South Town in the manor of Gorleston in the hundred or half hundred of Lothingland in the county of Suffolk to and from the vill of Great Yarmouth in the county of Norfolk. And it is further adjudged that the defendant his servants and agents be and they are hereby perpetually restrained from carrying passengers or their goods across the said river Yare from or to the Gas House Quay in South Town to or from the Fish Wharf in Great Yarmouth and from in any other manner disturbing or interfering with the plaintiff company's said ancient ferry."

J. E. A.

KERSHAW, Appellant *v.* ALFRED JOHN SMITH & CO., LIMITED, Respondents.

1913
April 1, 2.

Metropolis—Management—"Drain"—"Sewer"—Liability to repair—Group of Houses drained by Combined Operation—Departure from Approved Plan—Reinstatement—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 83, 85, 250.

A local authority made an order for the drainage of a group of houses by a combined operation as shewn on an approved plan. The builder in carrying out the work wrongfully connected with the combined drain the drains from two houses outside the group, thereby causing a pipe passing under one of the houses in the group, which had been purchased by the respondents without notice of the builder's wrongful act, to become a sewer within the definition in s. 250 of the Metropolis Management Act, 1855, as between the local authority and the respondents. Subsequently the local authority served on the builder a notice under s. 83 of the Act of 1855 requiring him to reinstate the drainage of the group of houses in accordance with the plan originally approved, and on his default in complying with the notice the local authority themselves did the work. After the completion of the work a nuisance existed from the defective condition of the pipe under the respondents' house which carried off the drainage from the group of houses:—

Held by Ridley and Avory JJ., Pickford J. dissenting, that at the date when the work of reinstating the combined drainage as originally sanctioned was completed the pipe ceased to be a sewer repairable by the local authority and became a drain, and that the respondents were liable under s. 85 of the Act of 1855 to remedy the nuisance.

Vestry of St. Leonard, Shoreditch v. *Phelan* [1896] 1 Q. B. 533, distinguished.

Case stated by a metropolitan magistrate.

The respondents were summoned to answer an information laid by the appellant for that they within the metropolitan borough of Hampstead, in the county of London, to wit, at No. 178, High Road, Kilburn, had unlawfully neglected to comply with the notice of the Hampstead Borough Council dated April 10, 1912, whereby they were required within fourteen days to take up the combined drain from the sewer to the manhole in the passage at the rear, remove all foul and polluted earth from under and around the same, and reinstate it in iron pipes of an internal diameter of not less than five inches.

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At the hearing of the information the following facts were proved or admitted:—

4. (A) The appellant is the senior sanitary inspector of the Hampstead Metropolitan Borough Council (hereinafter referred to as "the council"), which is the sanitary authority for the district comprising the metropolitan borough of Hampstead. The respondents are the owners of No. 178, High Road, Kilburn, within the said borough.

(B) The premises known as No. 178, High Road, Kilburn, are drained by a line of pipes which takes also the drainage of certain adjoining premises as hereinafter stated and passes under No. 178, High Road and thence to the public sewer in High Road with which it is connected. The line of pipes referred to as a combined drain in the information is that part of the said line of pipes which passes under No. 178, High Road.

(C) On August 13, 1884, an application in writing accompanied by a plan was made to the vestry of the parish of St. John, Hampstead (which was at that time the proper authority under s. 76 of the Metropolis Management Act, 1855), for permission to drain twelve houses and shops situate in High Road, Kilburn, by a combined operation. The said houses are now numbered 178 to 200 (even numbers only). The application, which was signed by A. Hackworth, the builder and then owner of No. 178, High Road, Kilburn, and eleven other houses and shops, was approved by the vestry at a meeting held on September 25, 1884, and on that date an order was made by the vestry for the drainage of the said twelve houses and shops by a combined operation in the manner and according to the falls shewn upon the approved plan.

(D) The house No. 178, High Road, Kilburn, was in February, 1887, purchased by one Alfred John Smith from Hackworth for valuable consideration and without notice that the drainage system was in contravention of the approved plan, and subsequently was assigned by Smith to the respondents for value without notice that the drainage system was in contravention of the approved plan.

(E) In February, 1912, the appellant in pursuance of his powers under s. 82 of the Act of 1855 inspected the line of pipes passing

under No. 178, High Road and stated that he found it to be in bad order and condition.

(F) On March 7, 1912, the appellant in pursuance of his said powers inspected the drains of each of the other eleven houses. The inspection shewed that the drains had not been made in accordance with the directions and regulations of the vestry nor in accordance with the approved plan, but on the contrary this examination revealed serious deviations from the plan, inasmuch as (i.) in the approved plan the twelve houses were divided for drainage purposes into two groups; the first group consisted of five houses (Nos. 178, 180, 182, 184, and 186) to be drained into the public sewer in High Road, Kilburn, then belonging to the Metropolitan Board of Works, and the second group consisted of seven houses (Nos. 188, 190, 192, 194, 196, 198, and 200) to be drained into the public sewer in Eresby Road then belonging to the vestry; whereas as carried out and as found existing the seven houses Nos. 178, 180, 182, 184, 186, 188, and 190 were grouped together and were drained together by means of the line of pipes passing under No. 178 which was connected with the public sewer in High Road; (ii.) a drain from a workshop in the occupation of one Harris at the rear of No. 178 and divided from No. 178 by a passage had been connected to the said drains; (iii.) four gulleys in this passage had been connected to the said drains; and (iv.) certain other minor deviations had been made.

(G) The drainage of No. 180 was not originally laid as shewn on the approved plan, and in February, 1909, the council became aware of this fact, when the drainage of this house was relaid by the owner of those premises, the work being done under the supervision of the council, and the course of the drain was then altered so as to be in accordance with the approved plan.

(H) On March 8, 1912, a notice under s. 83 of the Act of 1855 (1) was served upon Hackworth, the original owner and

(1) Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 83: "In case any drain . . . . be found on inspection not to have been made or provided according to the directions or regulations of the vestry or district board . . . . every person so offending shall forfeit and pay any sum not exceeding ten pounds; and in case the person so making any . . . . drain . . . . as aforesaid contrary to the directions or regulations of the vestry or board . . . . do not, within fourteen days after notice in

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builder of the houses, requiring him within fourteen days to cause the drains of the houses Nos. 178 to 190 to be altered in conformity with the directions of the council and so as to be in accordance with the approved plan. This notice was not served upon or brought to the notice of either Harris, the occupier of the workshop, or the respondents.

(I) Hackworth did not comply with the notice, and the council in alleged pursuance of their powers under s. 83 themselves caused the work to be done without any notice to either Harris or the respondents, and the council entered upon the workshop and removed the water closet and lavatory erected therein and pulled up the pipes. The work was completed on April 4, 1912, and the account of the expenses thereof was sent by the council to Hackworth. The scheme of drainage as at present existing after the execution of the said works by the council was shewn upon a plan attached to the case, which shewed that the drainage of Nos. 188 and 190 had been disconnected from the line of pipes passing under No. 178 and had been added to the line of pipes passing into Eresby Road, and that the whole of the drainage system to the workshop had also been removed, and that the drainage of the said premises Nos. 178 to 200, High Road is now in accordance with the plan approved by the vestry on September 25, 1884.

(J) On April 10, 1912, the notice set out above was served on the respondents under s. 85 of the Act.

5. The appellant contended that the order of the vestry referred to in paragraph 4 (C) hereof was an order for the drainage of the group or block of twelve houses and shops by a combined

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writing by the vestry or board, cause such . . . . drain . . . . to be altered or reinstated in conformity with the directions of the vestry or board . . . . then and in every such case the vestry or board may cause the work to be done, and the expenses thereof shall be paid by the person who has so offended."

Sect. 250 " . . . . The word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage . . . . and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain' interpreted as aforesaid applies; . . . ."

operation, and that, inasmuch as the council after the discovery by the appellant as aforesaid that the drains had not been made according to the directions and regulations of the vestry took the steps prescribed by s. 83 of the Act of 1855 to cause such drains to be altered in conformity with the said directions and regulations, the said line of pipes constituted a drain repairable by the respondents. He referred to the cases of *Kershaw* v. *Taylor* (1) and *Heaver* v. *Fulham Borough Council.* (2)

6. On the close of the case for the appellant the respondents (while not admitting that any nuisance existed on the premises other than that caused by the council in the month of April, 1912, as aforesaid) contended before the magistrate :—

(A) That the line of pipes passing under No. 178, High Road was a sewer repairable by the borough council for the following reasons :—(i.) That there was no order or direction of the vestry for draining the premises by a combined operation within the meaning of the Metropolis Management Acts, and that even if there were anything in the nature of an order or direction for drainage by a combined operation the system of drainage as constructed was in no way ordered by the vestry. (ii.) That the scheme of drainage for the seven houses Nos. 178, 180, 182, 184, 186, 188, and 190 as carried out was never submitted to the judgment of the vestry nor sanctioned nor ordered by them. (iii.) That the said line of pipes under No. 178, High Road took, in addition to the drainage of the five houses (Nos. 178, 180, 182, 184, and 186, High Road) ordered by the vestry to be drained under No. 178, High Road, (*a*) the drainage of the two additional houses, namely, Nos. 188 and 190, High Road; (*b*) the drainage from the four gulleys in the passage way; (*c*) the drainage from the workshop. (iv.) That the scheme of drainage of the seven houses as it existed before the same was altered by the council in April, 1912, had not been approved and ordered as a combined operation. (v.) That on the facts stated the said line of pipes was a sewer before the council executed the works in the month of April, 1912. (vi.) That by s. 68 of the Act of 1855 it was provided that every sewer made and to be made within the district should be vested in the vestry, and by s. 69 they are

(1) [1895] 2 Q. B. 208, 471. (2) [1904] 2 K. B. 383.

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bound to repair and maintain all sewers vested in them. (vii.) That there is no provision enabling them by any means to divest themselves of sewers. (viii.) That the said line of pipes was not a drain within the meaning of s. 250 of the Metropolis Management Act, 1855.

(B) That by reason of the very serious deviations from the approved plan the vestry and council had had notice for a number of years past that the scheme as ordered had never been carried out.

(C) That the council in February, 1909, had special notice that the scheme as ordered had not been carried out, and took no action then.

(D) That the steps referred to in paragraph 4 (H) and (I) hereof against Hackworth were illegal as the pipes in question were a sewer and s. 83 of the Act of 1855 did not relate to sewers, and that even if they had been a drain such steps were out of date and barred.

(E) That the respondents are not "persons offending" within the meaning of s. 83 of the Act of 1855.

(F) That the respondents being purchasers for value without notice were not estopped from setting up the claim that the said line of pipes is a sewer whatever Hackworth's position might be.

7. The magistrate found as a fact that the drainage system as carried out by Hackworth had never been approved by the said vestry, and he was of opinion that the line of pipes passing under No. 178, High Road was a sewer repairable by the council, and he accordingly dismissed the information.

The question for the opinion of the Court was whether the determination of the magistrate was correct in point of law.

Danckwerts, K.C., and *S. G. Turner*, for the appellant. From the date when this pipe was constructed in 1884 down to April 4, 1912, it was no doubt a sewer within the definition in s. 250 of the Metropolis Management Act, 1855, and not a drain, because by reason of the fact that the builder had not constructed the drainage of the row of houses in accordance with the plan approved by the vestry it was a pipe which carried off the drainage of more than one house and was not a pipe draining a

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group of houses by a combined operation under an order of the vestry: *Kershaw* v. *Taylor* (1); *Heaver* v. *Fulham Borough Council* (2); *Wilson's Music and General Printing Co.* v. *Finsbury Borough Council.* (3) Those cases establish clearly that, whatever may be the legal liability of the original builder, a purchaser for value without notice that the drain has been wrongly constructed can successfully resist liability to repair on the ground that the act of the builder has caused the pipe to become a sewer. But in this case the local authority acting under s. 83 of the Act of 1855 have done the work necessary to bring the drainage system of these houses into accordance with the plan originally sanctioned by the vestry. The case finds that this work was completed on April 4, 1912, and from that date the pipe ceased to be a sewer and became a drain. The proceedings against the respondents are in respect of a nuisance arising from the defective state of the pipe on April 10, 1912, which was the date of the notice served on the respondents under s. 85 of the Act. On that date the pipe was a drain and the respondents were consequently liable to repair it. It is immaterial that at some previous date the pipe was a sewer, for, as Kay L.J. said in *Kershaw* v. *Taylor* (4), "The question however is, rebus sic stantibus, is this a drain or a sewer?"

Macmorran, K.C., and *George Phillips*, for the respondents. The respondents purchased the house, No. 178, in 1887 without notice that there had been any irregularity on the part of the builder in the construction of the drains of the houses. It is not, and cannot be, disputed that down to April, 1912, the respondents were entitled as against the local authority to say that the pipe in question was a sewer. It is said on behalf of the appellant that by reason of the work done to the drains in 1912 the pipe has now become a drain; but as against a bona fide purchaser for value without notice there is no power for the local authority to divest themselves of what has as against them been for many years a sewer. Proceedings under s. 83 of the Act of 1855 can only be taken against the person offending.

(1) [1895] 2 Q. B. 208, 471.
(2) [1904] 2 K. B. 383.
(3) [1908] 1 K. B. 563.
(4) [1895] 2 Q. B. at p. 473.

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The respondents were not persons offending, and it is extremely doubtful whether the local authority had any right to enter the respondents' premises for the purpose of doing the work; but in any case the pipe having once been a sewer cannot by any action of the local authority be converted into a drain. On this point *Vestry of St. Leonard, Shoreditch* v. *Phelan* (1) is a decisive authority in favour of the respondents, for it was held in that case that a pipe which had been a sewer because it carried off the drainage of two houses did not cease to be a sewer and become a drain when one of the houses was disconnected from it. Further, on the facts found in the case it is obvious that the defect in this pipe for which the local authority are seeking to make the respondents liable is the result of a state of things which existed when the pipe was admittedly a sewer, and the respondents are, therefore, not responsible for it.

Danckwerts, K.C., in reply. In *Vestry of St. Leonard, Shoreditch* v. *Phelan* (1) there was no question before the Court as to the effect of work of reinstatement done under s. 83; nor was the attention of the Court called to the cases of *Rolls* v. *Vestry of St. George the Martyr, Southwark* (2) and *Bradford* v. *Eastbourne Corporation.* (3) In the former case it was held that streets are only vested in the local authority so long as they are highways, and when they cease to be highways by being legally stopped up or diverted the interest of the local authority determines. In the latter case that principle was applied to sewers, and Lord Russell C.J., discussing the meaning of the word "vest" in s. 13 of the Public Health Act, 1875, said: "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter . . . . But if the duty is partly or entirely shifted from the local authority to individuals, that right which the word *vest* gives to the local authority disappears to the same extent." Although the respondents were purchasers for value without notice, they were the purchasers of

(1) [1896] 1 Q. B. 533. (2) (1880) 14 Ch. D. 785.
(3) [1896] 2 Q. B. 205.

that which could under s. 83 be, and has since been, converted from a sewer into a drain.

AVORY J. As there is a difference of opinion between the members of the Court on one point in this case, I have been asked to deliver my judgment first.

An information was laid under s. 64 of the Metropolis Management Act, 1862 (which amended s. 85 of the Metropolis Management Act, 1855), alleging a default on the part of the respondents in complying with an order of the local authority which had been served on the respondents on April 10, 1912. The questions arising on that information for decision by the magistrate were, first, whether a line of pipes which passed under the respondents' house, No. 178, High Road, Kilburn, was at the date when the order was served on the respondents a drain or a sewer within the meaning of the Metropolis Management Acts; and, secondly, if it was a drain, whether it was in bad order and condition and required cleansing or alteration. The magistrate held that it was a sewer, and the only question on which the opinion of this Court is asked by the case is whether he was right in law in so holding. If the pipe is what is sometimes called a combined drain, that is to say, a pipe made under an order for the drainage of more than one house by combined operation, it was not a sewer, any more than a pipe which drains one house only is a sewer. That is the reason why in the course of the argument I put the following case. Suppose that, a scheme for the drainage of two adjoining houses separately having been sanctioned by the local authority, the builder in order to save expense drains the two houses by one combined drain, and the house under which the common part of the drain passes is sold a few days afterwards to a purchaser who buys without notice of what the builder has done; the local authority then discover that the builder has not constructed the drains as sanctioned, proceedings are taken against him under s. 83 of the Act of 1855, and he restores the work in accordance with the original plan, or the local authority do so on his behalf; in these circumstances, if the purchaser of the house is subsequently proceeded against under s. 85, as amended by s. 64 of the Act of 1862, could he contend

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successfully that the pipe is a sewer? In my opinion he could not do so, and I think that this case must be decided on exactly the same principle as if the original drainage plan sanctioned by the local authority had provided for the draining of each of these houses by a single drain. In the present case the combined drain had by April 4 been reinstated as originally sanctioned, that is to say, before the notice was served on the respondents, and at that date the pipe was in my opinion not a sewer but a combined drain. The authorities undoubtedly shew that by the wrongful act of a builder this line of pipes became for a time a sewer, and although the builder could not set up his own wrongful act in support of the contention that it was a sewer, a purchaser for value without notice might do so. It may be that it follows from the authorities that if these proceedings against the respondents had been commenced before the completion of the work of reconstructing the drainage so as to make it as originally sanctioned, it would have been open to the respondents to say that they were not estopped from alleging that the pipe at that time was a sewer. Speaking for myself I concur with the observation of Channell J. in *Wilson's Music and General Printing Co.* v. *Finsbury Borough Council* (1) where he said: "I think that some day the authorities will go further and that it will probably be held that a pipe is not a sewer as between the person seeking to make the local authority liable and the local authority, if that person in fact claims through the wrong-doer, although he may be a purchaser for value without notice." I agree that although the authorities are binding on this Court the question deserves further consideration, and in particular the question, upon which the authorities appear to have been decided, whether the doctrine of estoppel has any proper application to it. To constitute an estoppel there must be an untruth stated, or an act done, whereby another person is prejudiced or induced to act to his prejudice. I fail to see how a local authority can necessarily be said to be prejudiced by the mere fact of a builder wrongfully making a sewer instead of a combined drain; at all events in the present case the local authority have not been prejudiced, because they have never in fact maintained the pipes as a sewer, and by the operation of

(1) [1908] 1 K. B. at p. 567.

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s. 83 they are in my opinion relieved from any obligation to maintain the pipes as a sewer. In *Kershaw* v. *Taylor* (1) Wright J. left open the question (if he did not actually decide it) whether the local authority might not by proceeding under s. 83 restore the status quo ante. No proceedings under s. 83 had in fact been taken by the local authority in *Kershaw* v. *Taylor* (1), and the judgments of the Court of Appeal proceeded on the footing that the question must be determined in each case rebus sic stantibus, and it is for that reason that in my opinion this case ought to be decided rebus sic stantibus on April 10, 1912, when the notice was served on the respondents, and on that date, in my opinion, the line of pipes was not a sewer but a combined drain.

The only other difficulty in the case, and it is that which has caused some difference of opinion between us, is the decision in the case of *Vestry of St. Leonard, Shoreditch* v. *Phelan* (2), which has been compendiously described as a decision that "once a sewer always a sewer." If that decision is sound, it would undoubtedly apply to this case, and it is inconsistent with the view which I have expressed in this judgment, but it is to be observed that one of the learned judges who decided that case, Wills J., was largely influenced by the fact that there was no divesting clause in the statute, that there was no power expressly given to a local authority to divest themselves of a sewer which had once become vested in them. In my opinion the cases to which Mr. Danckwerts has called our attention get rid of that difficulty; at all events I think they enable us to say, if authority is needed for it, that if a pipe ceases to be a sewer, it is no longer a sewer vested in the local authority. I confess that I am unable to follow the decision in *Vestry of St. Leonard, Shoreditch* v. *Phelan* (2) to the full extent if it is to be taken as deciding that a pipe or a line of pipes which has once been a sewer must remain a sewer for all time subject to the control of the local authority which will always remain liable to maintain it as a sewer. There would appear to me to be many cases in which it might physically happen that a thing which was at one time a sewer might by some alteration become converted into a drain. But the chief

(1) [1895] 2 Q. B. 208, 471. (2) [1896] 1 Q. B. 533.

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ground on which I feel justified in saying that the *Shoreditch Case* (1) does not govern the present case is that s. 83 of the Act of 1855, which is I think the governing factor in the determination of this case, was not brought to the attention of the Court, nor do I find that it was present to the minds of the learned judges, nor was such a state of facts as has arisen in this case present to their minds. Therefore in my opinion the *Shoreditch Case* (1) does not govern this case. It is not necessary for me to say, even if I were disposed to do so, that I differ from that decision. It is sufficient to say that I do not think it applies to the facts of this case.

For these reasons I think that this appeal ought to be allowed.

PICKFORD J. I have the misfortune to differ from the other members of the Court, but upon one point only. I do not think that we can disregard the authority of *Vestry of St. Leonard, Shoreditch* v. *Phelan.* (1) I accept the view that this line of pipes was at one time a sewer although the person by whose wrongful act it became a sewer was not entitled as against the local authority to say that it was a sewer. I also accept the proposition that by reason of the proceedings taken and the work done under s. 83 it has now become a drain. In these circumstances the question arises whether the pipe being a drain at the time when the notice was served on the respondents, and at the time when the obstruction in the pipe existed, although on the facts stated in the case the obstruction in my opinion probably existed also when the pipe was a sewer, the respondents are responsible for the existence of that obstruction. That seems to me to be the very question which arises in the *Shoreditch Case* (1), and the decision of the Court was that in those circumstances the owners of the property were not responsible. It is true that s. 83 was not referred to in that case; but it is difficult to see why it should have been, because no work had been done under that section. I agree, therefore, that the Court was not dealing with a case where the alteration from sewer to drain had resulted from work done under the statutory powers of s. 83. But the ultimate result was the same. The conduit, to use a

(1) [1896] 1 Q. B. 533.

colourless phrase, being a sewer was by an alteration in the connection of other drains with it converted from what satisfies the definition of a sewer into what satisfies the definition of a drain. It does not seem to me to matter whether the work which so converted it was done under statutory powers or not. The actual question which we have to decide in this case seems to me, therefore, to be the precise point which was presented for decision in the *Shoreditch Case.* (1) The authority of the decision may I think be properly said to have been somewhat weakened by the subsequent cases as to vesting, but it has never been overruled. It was not cited in *Bradford* v. *Eastbourne Corporation* (2), and Wills J. was a party to both decisions, one judgment being given in March, 1896, and the other in June of the same year, and I cannot think that Wills J. intended in the later case to depart from what had been said in the *Shoreditch Case.* (1) In these circumstances it is in my opinion a decision directly in point and I do not feel myself at liberty to disregard it. My judgment on that point would therefore be in favour of the respondents. It is upon that point alone that I differ from the other members of the Court.

RIDLEY J. I am in the position of having to decide between my brethren as to the extent to which the decision in *Vestry of St. Leonard, Shoreditch* v. *Phelan* (1) binds the Court in this case. On the other points raised by the case we are in accord, and it is, therefore, not necessary for me to repeat what has been said as to the general question arising under the Metropolis Management Act, 1855. The position has been well summed up by Channell J. in *Wilson's Music and General Printing Co.* v. *Finsbury Borough Council* (3) where he said: "It was decided by me in *Heaver* v. *Fulham Borough Council* (4), and also by Cozens-Hardy J. in *Hedley* v. *Webb* (5), that if the local authority can shew that the connection was made wrongfully by the person who is seeking to put the liability for repair on the local authority, or by a person claiming through him (otherwise than a purchaser for value

(1) [1896] 1 Q. B. 533.
(2) [1896] 2 Q. B. 205.
(3) [1908] 1 K. B. at p. 567.
(4) [1904] 2 K. B. 383.
(5) [1901] 2 Ch. 126.

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without notice), then the pipe is not to be deemed to be a sewer as between the local authority and that person, and the local authority are not liable for its repair. I think that some day the authorities will go further, and that it will probably be held that a pipe is not a sewer as between the person seeking to make the local authority liable and the local authority, if that person in fact claims through the wrong-doer, although he may be a purchaser for value without notice." That is the general position as summed up in those cases, but it cannot be said that the facts of the present case quite bring it within those authorities, for in this case it happens that the local authority after discovering the wrongful act of the builder reinstated the pipe in the way in which it ought to have been constructed in the first instance, the result of which is, it is contended, to make the pipe a drain. I am unable to see how in the present state of the law there can be any estoppel as between the respondents who were bona fide purchasers for value and the local authority, and I have therefore come to the same conclusion on this part of the case as my brethren.

I agree with Avory J. as to the effect of the *Shoreditch Case.* (1) The facts in that case were that a certain pipe had been a sewer within the meaning of the Metropolis Management Act, 1855, by reason of its carrying off the sewage of two houses. Subsequently the owner of one of the houses disconnected his sewage, so that the pipe drained one house only, and it therefore came within the definition of "drain" in the Act. No proceedings had been taken by the local authority under s. 83 and there was nothing to shew that the local authority had ever ordered the drainage system to be constructed in such a way that the pipe would be a drain and not a sewer. The argument of Mr. Rowlatt as reported was as follows: "Once a sewer always a sewer. By s. 68 of the Metropolis Management Act, 1855, every sewer made and to be made within the district shall be vested in the vestry. . . . . There is no provision enabling them to divest themselves of sewers, and such a divesting cannot be effected except by statute." The Court in giving judgment seems to have adopted that line of argument. The judgment of Wills J. has already

(1) [1896] 1 Q. B. 533.

been quoted. Day J. said (1): "In my judgment once a sewer—I do not say always a sewer—but certainly always a sewer so long as it is used for the purpose of conveying sewage." I do not quite agree with that, for a pipe which conveys sewage may be a drain. "I say so because I find that the Act of Parliament provides that every sewer, whether existing at the time the Act was passed or constructed afterwards, is to become vested in the vestry of the parish, who are bound to maintain and repair it. There is no provision in the statutes for divesting sewers, or for relieving the vestry from their duty to maintain and repair. In the present case I think that this sewer was vested in the vestry, and did not cease to be a sewer because the owner of No. 36, Nile Street, has found some other way of disposing of his sewage." Those observations seem to me to point very much in the same direction as the remarks of Wills J. in the same case, where he said (2): "Consequently when this system of drainage, by which two houses are drained by the use of one common pipe, was made, the pipe and works necessary to constitute the system vested in the vestry, and so long as they are vested in and belong to the vestry it cannot, I think, be contended that the machinery of the Act can be put into force to make any other person liable to do the work which would naturally fall upon the owner of the sewer. I think that the pipe and works when vested in the vestry are vested once for all." In the next volume of the *Law Reports* there is reported the case of *Bradford* v. *Eastbourne Corporation*. (3) The question there did not arise under the Metropolis Management Acts, but under the Public Health Acts, but for the purpose of the decision it became necessary to consider the meaning of the word "vest" in s. 13 of the Public Health Act, 1875, and I think that some of the observations of Lord Russell C.J. and also of Wills J. are not entirely consistent with the decision in the *Shoreditch Case*. (4) Dealing with the word "vest" Lord Russell C.J. said (5): "It has been clearly held that the vesting is not a giving of the property in the sewer and in the soil surrounding it to the local

(1) [1896] 1 Q. B. at p. 538.
(2) *Ibid.* at p. 539.
(3) [1896] 2 Q. B. 205.
(4) [1896] 1 Q. B. 533.
(5) [1896] 2 Q. B. at p. 211.

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Ridley J.

authority, but giving such ownership and such rights only as are necessary for the purpose of carrying out the duties of a local authority with regard to the subject-matter." The Lord Chief Justice then quoted several authorities, and continued: "But if the duty is partly or entirely shifted from the local authority to individuals, that right which the word *vest* gives to the local authority disappears to the same extent"; and Wills J. said: "In the remarks of the Lord Chief Justice as to the meaning and application of the expression 'vest' I entirely agree."

I think, therefore, that reading those two cases together we are at liberty to say that the vesting of a sewer in a local authority is only for the purpose of enabling the local authority to carry out their duties, and if a pipe ceases to be a sewer it ceases to be vested in the local authority, although the Acts contain no divesting clause. I do not find in the *Shoreditch Case* (1) the difficulty which presents itself to Pickford J. For these reasons I am of opinion that our judgment ought to be for the appellant on the ground that at the time of the matters complained of the pipe in question was a drain and not a sewer.

Appeal allowed.

Solicitor for appellant: *Arthur P. Johnson.*

Solicitor for respondent: *J. S. Phillips.*

(1) [1896] 1 Q. B. 533.

F. O. R.

NELSON *v.* JAMES NELSON & SONS, LIMITED.

[1912 N. 1075.]

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April 14, 16.

Company—Articles of Association—Board of Directors—Powers—Appointment of Managing Director—Power to revoke Appointment.

The articles of association of the defendant company provided that the board of directors might appoint a managing director for such period as they deemed fit, and might revoke the appointment. The board appointed the plaintiff to be managing director upon the terms of an agreement which provided that he should hold the office so long as he should remain a director of the company and retain his due qualification and efficiently perform the duties of the office. Subsequently, while the plaintiff was still fulfilling the conditions of the agreement, the board revoked the appointment. The plaintiff sued the company for damages for breach of agreement:—

Held, that the articles of association did not empower the board to revoke the appointment at will, but for good cause only, and that the plaintiff was entitled to recover damages against the company.

Bluett v. *Stutchburys, Ld.* (1908) 24 Times L. R. 469, distinguished.

Action in the commercial list tried by Scrutton J. and a special jury.

The defendant company carried on business as importers of and dealers in meat, cattle, and sheep in the British Isles and South America. In 1904 the plaintiff, Thomas Cormac Nelson, who was a director of and a shareholder in the company, was appointed joint managing director of the company with his brother Edward Nelson. On January 16, 1908, an agreement in writing was entered into between the plaintiff and the company which provided that the plaintiff should continue to act as joint managing director at a salary of 3000*l.* a year. Clause 2 of the agreement was as follows: "The said Thomas Cormac Nelson shall hold the said office so long as he shall remain a director of the company and retain his due qualification and shall efficiently perform the duties of the said office."

On September 10, 1912, the directors of the company passed a resolution revoking the appointment of the plaintiff as joint managing director of the company. At that date the plaintiff was a director of the company and retained his due qualification, and it was not suggested that he had not efficiently performed the duties of his office.

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The plaintiff alleged that the revocation of his appointment constituted a breach of the agreement of January 16, 1908, for which he claimed damages in this action.

The defendant company by their defence pleaded (1.) that by article 85 (*b*) of the articles of association of the company the directors of the company had power to revoke the plaintiff's appointment; (2.) that the directors had no power or authority to appoint the plaintiff to be joint managing director of the company or to enter into the agreement of January 16, 1908, except upon the terms of and in accordance with the articles of association, including article 85 (*b*), under which the appointment was expressly subject to revocation.

The company's articles of association, so far as is material to this report, were as follows:—

84. "The business of the company shall be managed by the board, who may pay all expenses of or incident to the formation, registration and advertising of the company, and the issue of its capital, including brokerage and commissions for obtaining applications for or placing shares. The board may exercise all the powers of the company, subject, nevertheless, to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions or these articles) as may be prescribed by the company in general meeting, but no regulations made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulations had not been made."

85. "Without restricting the generality of the foregoing powers, the board may do all the following things . . . . (*b*) appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration (including the payment of a commission varying with the amount of the company's profits), and with such powers and authorities, and for such period as they deem fit, and may revoke such appointment."

94. "The office of director shall be vacated . . . . (*b*) if he become of unsound mind, bankrupt, or compound with his creditors . . . . (*c*) if he be absent from the board meeting continuously for six months without the consent of the board."

96. "At the ordinary general meeting in the year next but one after the year in which the company is incorporated, and at the ordinary general meeting in every subsequent year, one-third of the directors for the time being, or if their number be not a multiple of three, then the number nearest to one-third, shall retire from office. A managing director holding that office for an unexpired term shall not be subject to retirement under this clause or be taken into account in ascertaining the number of directors to retire."

101. "The company in general meeting may by an extraordinary resolution remove any director (other than a managing director holding that office for an unexpired term) before the expiration of his period of office, and may by an ordinary resolution appoint another qualified person in his stead."

It was agreed that the only question to be left to the jury should be the amount of damages, assuming that the plaintiff was entitled to damages.

The jury assessed the damages at 15,000*l.*

Astbury, K.C. (*Shearman, K.C.*, and *Bremner* with him), for the defendant company. The action cannot be maintained. The company have by article 85 (*b*) of the articles of association authorized the directors to appoint a managing director, and to revoke the appointment, which means to revoke it at any time and for any reason. A company can by its articles of association delegate any powers to its directors, and during the continuance of those powers, that is to say until the articles of association have been altered by a special resolution of shareholders at an extraordinary general meeting, the company cannot interfere with the exercise of those powers by the directors: *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson.* (1) Further, having regard to the powers as to revocation conferred upon the directors by article 85 (*b*), it would be ultra vires if the directors purported to appoint a managing director without reserving to themselves power to revoke the appointment. The agreement of January 16, 1908, must therefore be read as containing an implied power to revoke the appointment, for unless the agreement

(1) (1882) 23 Ch. D. 1.

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contained that power it would be ultra vires the directors. Any one who enters into an agreement with the directors of a company must be taken to know that the powers of directors are limited and must satisfy himself that it is within the powers of the directors to enter into the agreement, but the plaintiff was himself a director and also a shareholder at the time of the agreement, and he is therefore estopped from saying that his appointment as managing director was not subject to the power of revocation contained in article 85 (*b*): *In re Anglo-Austrian Printing and Publishing Union.* (1) The question arising in this action is really concluded by the decision of the Court of Appeal in *Bluett* v. *Stutchburys, Ld.* (2) In that case the directors of a company had power to appoint "one of their number" to be a managing director "for such period as they deem fit and may revoke such appointment." The plaintiff, who was a director, was appointed managing director for a period of four years, but at the next annual general meeting he failed to procure re-election as a director, and the company thereupon determined his appointment as managing director. The Court of Appeal held that the company were entitled to do so, and that under the articles of association the directors had no power to appoint the plaintiff a managing director to hold office for four years, regardless of whether he continued to be a director or not. So in the present case the directors had no power to appoint a managing director without reserving to themselves power to revoke the appointment. [*Boschoek Proprietary Co.* v. *Fuke* (3), *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame* (4), and *Horn* v. *Henry Faulder & Co.* (5) were also referred to.]

Sir E. Carson, K.C., and *Leslie Scott, K.C.* (*L. F. C. Darby* with them), for the plaintiff. The words in article 85 (*b*) "and may revoke such appointment" mean either that the directors may exercise the power of revocation if circumstances exist which legally entitle them to do so, or that they may do so subject to the legal consequences resulting from the breach of the contract which they have entered into. The directors are empowered to

(1) [1892] 2 Ch. 158.
(2) 24 Times L. R. 469.
(3) [1906] 1 Ch. 148.
(4) [1906] 2 Ch. 34.
(5) (1908) 99 L. T. 524.

appoint a managing director for "such period as they deem fit," and the article cannot mean that if they make an appointment for a term they are to have an unqualified power of revoking it at any time. Sect. 19 of the Conveyancing Act, 1881, gives power to a mortgagee to vary or rescind any contract of sale. It would be impossible to contend that that power could be exercised in the absence of circumstances legally justifying it, and the language of article 85 (*b*) must be read subject to a similar limitation. *Bluett* v. *Stutchburys, Ld.* (1) is distinguishable, for there the directors purported to appoint a managing director for a term of four years regardless of the fact that if he failed to be re-elected a director each year he would cease to be qualified as managing director, and therefore the appointment was held to be ultra vires. The decision cannot be treated as an authority on the meaning of the articles of this company, which do not require a managing director to be re-elected as a director.

Shearman, K.C., replied.

Cur. adv. vult.

April 16. SCRUTTON J. read the following judgment:—On January 16, 1908, the plaintiff, who was a shareholder in the defendant company, entered into an agreement with them by which his existing office of joint managing director with his brother Edward Nelson was continued on terms therein stated. His tenure of that office, so far as express provisions go, was contained in clause 2 of this agreement, which reads: "The said Thomas Cormac Nelson shall hold the said office so long as he shall remain a director of the company and retain his due qualification and shall efficiently perform the duties of the said office." In August, 1912, he was still a director of the company. He retained his due qualification of 500 shares and he had efficiently performed the duties of his office. But on September 10, 1912, the directors revoked his employment as managing director. He thereupon brought an action for damages for wrongful dismissal, and the jury assessed the damages, if he was entitled to them, at 15,000*l.* The question whether he was entitled was then argued before me, and turned principally on

(1) 24 Times L. R. 469.

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the terms of article 85 (*b*) of the articles of association of the defendant company, which reads as follows: "Without restricting the generality of the foregoing powers, the board may do the following things . . . . (*b*) appoint from time to time any one or more of their number to be managing director or managing directors, on such terms as to remuneration (including the payment of a commission varying with the amount of the company's profits), and with such powers and authorities, and for such period as they deem fit, and may revoke such appointment."

Mr. Astbury, for the defendants, argued that the effect of this article was that the directors who appointed the plaintiff had the power to revoke the appointment at any time without notice, whatever its terms, and that if they had purported to appoint him without such power of revocation by them, the appointment was ultra vires; that as the directors of the company had only limited powers, any person contracting with them was put on inquiry as to their powers, of which he must be taken to have notice, especially if he were a member of the company; but that also the agreement must be read as subject to an implied power to revoke the appointment under article 85 (*b*), in which case it was intra vires, and the defendants had committed no breach.

I do not think I can imply a power to revoke at will in the agreement. Clause 2 clearly states the period for which Thomas Nelson shall hold the office—so long as he complies with three conditions—and I do not see my way to imply a fourth, "so long as the directors please," or "at the pleasure of the directors." To imply this seems to me to be contrary to the often quoted doctrine of implied terms laid down in *The Moorcock*. (1) I think that in this, as in any employment for a fixed term, a power of termination on serious misconduct is implied; and as appears hereafter I think it would be, without express statement, a term of the continuance of the agreement that the plaintiff should remain a duly qualified director, but I am unable to go further and imply a power to determine at pleasure, though the plaintiff complies with the express conditions of his appointment. If the term cannot be implied, the defendants

(1) (1889) 14 P. D. 64.

must satisfy me that the employment on these conditions, or an employment for a fixed term, say three years, on the same conditions, was ultra vires of the directors, if it did not contain a power to revoke, apart from misconduct.

Counsel for the defendants contended that this point was decided by the Court of Appeal in *Bluett* v. *Stutchburys, Ld.* (1) In that case the plaintiff alleged an agreement for four years certain. Article 80 empowered the directors to appoint another director who should only hold office until the next general meeting of the company, but should be eligible for re-election. Article 86 allowed the directors to appoint one of their number a managing director. Article 102 allowed an extraordinary general meeting to remove any director. The directors appointed the plaintiff as an additional director and as managing director for four years; but the first general meeting refused to re-elect him. Thereupon the directors refused to recognize him as managing director. The Court of Appeal dismissed the plaintiff's action, as I understand them, on two grounds—(1.) that the directors had only power to elect "one of their number" as managing director, and it was a condition of his keeping the appointment that he remained "one of their number"; (2.) that to treat his appointment as binding for four years was ultra vires, for it was inconsistent with the company's power to refuse to re-elect him under article 80 and to remove him under article 102. All these points are provided for in the present case. It is an express term of this agreement that the plaintiff here shall continue a director; there is no article requiring him to come up for re-election, and, on the contrary, articles 96 and 101 prevent a managing director "who holds his office for an unexpired term" (an odd phrase to use of a man holding at will or pleasure) either being required to come up for re-election, or being removed by a general meeting. I do not think *Bluett* v. *Stutchburys, Ld.* (1) decides the point before me.

Is there any prohibition in the articles against the directors appointing a managing director for a fixed term, provided he remains a director and performs his duty satisfactorily? If there is one it is to be extracted from the words "and may

(1) 24 Times L. R. 469.

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revoke such appointment." But I think sufficient meaning is given to these words if they are read "and may exercise the power of revoking the appointment when the company or directors may legally do so." To use an illustration quoted by the plaintiff's counsel, s. 19 of the Conveyancing Act, 1881, gives power to the mortgagee exercising a power of sale "to vary the contract" or "to rescind any contract," but this cannot mean to give him such a power unless by the ordinary law of contract he is entitled to do so. Article 85 (*b*) is, I believe, a very ordinary one in articles, and it would seem greatly to the prejudice of the company if, while they could employ a clerk for a fixed term, they could not offer so important an official as a managing director any security of tenure, but only an appointment at will or pleasure.

For these reasons the defendants, in my opinion, were not entitled to dismiss the plaintiff, and there must be judgment for him for 15,000*l.* with costs. I am struck by the enormous bundle of correspondence prepared for the judge and counsel, only four or five letters in which were referred to; and I direct the taxing Master to investigate how far this bundle was necessary and, if he finds any blame in the matter attaching to the plaintiff's advisers, to disallow the costs of and occasioned by the unnecessary correspondence; if the blame should appear to be due to the defendants, then of course they must pay for it.

Judgment for plaintiff.

Solicitors for plaintiff: *Lightbound, Owen & MacIver.*

Solicitors for defendant company: *Ashurst, Morris, Crisp & Co.*

F. O. R.

DAVIS *v.* MORTON.

1913
April 17.

Justices—Summary Jurisdiction—Offence for which Offender liable on Summary Conviction to Imprisonment for Term exceeding Three Months—Using House for Purpose of Betting with Persons resorting thereto—Betting Act, 1853 (16 & 17 *Vict. c.* 119), *s.* 1—*Omission to inform Person charged of his Right to be tried by Jury—Withdrawal of Summons—Jurisdiction to hear fresh Information under same Section of same Statute—Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 17.

Upon the hearing of an information preferred by the respondent against the appellant under s. 1 of the Betting Act, 1853, for using a house for the purpose of betting with persons resorting thereto, it was discovered, when the third of the respondent's witnesses was being examined, that the appellant had not, through inadvertence, been informed before the charge was proceeded with, as required by s. 17 of the Summary Jurisdiction Act, 1879, of his right to be tried by a jury, and thereupon the solicitor for the respondent withdrew the summons with the consent of the justices; although the solicitor for the appellant contended that there was no power to withdraw it.

A further information was subsequently preferred by the respondent under the same section (s. 1 of the Betting Act, 1853) against the appellant for using the house for the purpose of certain moneys being received by him as or for the consideration for assurances to pay or give certain sums of money on the happening of certain events or contingencies relating to certain horse races.

The evidence given on the hearing of both informations was substantially the same:—

Held, that the withdrawal of the first summons in consequence of the technical informality was not equivalent to a dismissal which could be pleaded in bar of the subsequent proceedings.

The dictum in *Pickavance* v. *Pickavance* [1901] P. 60, at p. 64, that the withdrawal of a summons by leave of the Court puts an end to the complaint upon which the summons is founded, does not apply where the withdrawal is owing to a technical informality in the proceedings on the hearing of the complaint.

Case stated by justices for the county borough of Huddersfield.

An information was preferred on September 14, 1912, by the respondent John Morton, who was the chief constable for the borough, under s. 1 of the Betting Act, 1853 (1), against the

(1) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1: "No house . . . . shall be . . . . used for the purpose of . . . . any person using the same . . . . betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such . . . . person as aforesaid as or for the consideration for any assurance . . . . to pay or give thereafter any money or valuable thing on any event or

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appellant, James Henry Davis, for that he the appellant, then being the occupier of a certain house, to wit, a beer-house known as the Ring o' Bells, situate at No. 19, Northgate in the borough, unlawfully did on the 4th, 5th, 6th, 7th, 9th, and 10th days of September, 1912, and on divers other days within six calendar months then last past, use the house for the purpose of betting with persons resorting thereto upon certain events or contingencies of and relating to certain horse races.

The information was heard by the justices on September 18, 1912, but when the third of the respondent's witnesses was being examined it was discovered that the appellant had not, through inadvertence, been informed before the charge was proceeded with, as required by s. 17 of the Summary Jurisdiction Act, 1879, of his right to be tried by a jury, and thereupon the solicitor for the respondent withdrew the summons with the consent of the justices; although the solicitor for the appellant contended that there was no power to withdraw it, as the Summary Jurisdiction Act, 1848, s. 14, required them either to convict the appellant or to dismiss the information. The evidence given at the hearing of the information was substantially the same as that given at the hearing of the further information hereinafter mentioned.

A further information was preferred on October 9, 1912, by the respondent under s. 1 of the Betting Act, 1853, against the appellant for that he, being then the occupier of a certain house, to wit, a beer-house known as the Ring o' Bells, situate at No. 19, Northgate in the borough, unlawfully did on the 4th, 5th, 6th, 7th, and 10th days of September, 1912, use the beer-house for the purpose of certain moneys being received by the occupier as or for the consideration for assurances to pay or give thereafter

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contingency of or relating to any horserace . . . ."

By s. 3 any person committing an offence against s. 1 is liable to a penalty not exceeding 100*l.* or to imprisonment with or without hard labour for any time not exceeding six calendar months.

By s. 17 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), a person charged before a Court of summary jurisdiction with an offence (which is not an assault) for which he is liable on conviction to be imprisoned for a term exceeding three months may claim a trial by jury, and the Court of summary jurisdiction before the charge is gone into shall inform him of his right.

certain sums of money on the happening of certain events or contingencies of and relating to horse races, to wit, on the winning of certain horse races by horses called respectively Cylba, Romeo, &c.

Before the charge was proceeded with the appellant's solicitor took the objection that the withdrawal of the first summons amounted to a dismissal, and precluded the issue of a second summons, but the justices proceeded to hear and determine the last-mentioned information and fined the appellant the sum of 20*l.* and ordered him to pay the sum of 11*s.* for costs.

Upon the hearing of the last-mentioned information the following facts were proved:—

On Wednesday, September 4, 1912, the appellant made forty-six bets on horse races at his house the Ring o' Bells, such bets being made by means of slips of paper containing the names of horses, one of the slips containing the name of Cylba, which was to run that day at the Derby summer meeting. Sixpence was paid along with the slip.

On Thursday, September 5, 1912, the appellant at his house made forty-seven bets on horse races, twenty-seven being made on slips of paper which were handed to him along with money, on the receipt of which he entered the bets in a memorandum book.

On Friday, September 6, 1912, the appellant made fifty-eight bets on horse races at his house with men, women, and children, some by slips of paper and money and others by payment of money without slips of paper.

On Saturday, September 7, 1912, the appellant at his house made eighty-six bets on horse races, some by slips of paper and money and others by money being put on the bagatelle table and the name of the horse mentioned.

On Tuesday, September 10, 1912, bets on horse races were made by the appellant in his house and slips of paper and money were handed to him.

On that day the police entered the appellant's house under a search warrant, and the memorandum book and pencil and a slip relating to the horse Romeo (being a bet made by one of the witnesses) were found upon the appellant. A number of racing books and sporting papers were found in the bar parlour

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and music room of the house, and upstairs a cigar box was found containing a large number of slips.

The witnesses for the prosecution were cross-examined by the appellant's solicitor, but no evidence was given by him or on his behalf.

The appellant's solicitor contended: (*a*) That the withdrawal of the first summons amounted to a discharge: *Pickavance* v. *Pickavance* (1); (*b*) that the appellant had been put in peril on the hearing of the first summons and could not be put in peril a second time: *Reg.* v. *Brackenridge* (2); (*c*) that as the evidence given on the hearing of the second summons was substantially the same as that given on the hearing of the first summons, and was sufficient to have convicted the appellant on the first summons, he could not be convicted on the second charge: *Reg.* v. *Drury* (3); *Wemyss* v. *Hopkins*. (4)

The respondent's solicitor contended: (*a*) That the withdrawal of the first summons did not amount to a discharge, as the omission to inform the appellant of his right to be tried by a jury prevented the justices from having jurisdiction to deal with him: *Reg.* v. *Cockshott* (5); *Rex* v. *Beesby* (6); (*b*) that the appellant was not put in peril on the hearing of the first summons, as the justices could not legally have either acquitted or convicted the appellant of the offence charged, and the proceedings would have been a nullity: *Foster* v. *Hull* (7); *Rex* v. *Marsham* (8); (*c*) that, although the evidence on the hearing of the second summons was substantially the same as that given on the hearing of the first summons, the offence alleged in the second summons was not the same as that alleged in the first summons, and there were in the second offence ingredients which need not be present in the first: *Bond* v. *Plomb* (9); and no decision having been given on the first summons, the matter was not res judicata: *Jenkins* v. *Merthyr Tydvil Urban District Council* (10); *Bollard* v. *Spring*. (11)

(1) [1901] P. 60.
(2) (1884) 48 J. P. 293.
(3) (1849) 18 L. J. (M.C.) 189.
(4) (1875) L. R. 10 Q. B. 378.
(5) [1898] 1 Q. B. 582.
(6) [1909] 1 K. B. 849.
(7) (1869) 33 J. P. 629.
(8) [1912] 2 K. B. 362.
(9) [1894] 1 Q. B. 169.
(10) (1899) 80 L. T. 600.
(11) (1887) 51 J. P. 501

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The justices were of opinion that the several contentions of the respondent's solicitor were valid and that the appellant could be convicted of the offence charged against him in the second summons.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law.

Lowenthal, for the appellant. The effect of the withdrawal of the summons on the first hearing was that it was dismissed, and the Court cannot go behind that dismissal: *Pickavance* v. *Pickavance*. (1) On the second hearing the appellant was in the position of being able to plead autrefois acquit. It must be admitted that *Rex* v. *Marsham* (2) appears to be against the appellant, especially the judgment of Avory J., in which it was laid down that in order to plead autrefois acquit "it must appear that the defendant has been . . . . legally acquitted, and it is laid down in Chitty on Criminal Law, 2nd ed. vol. 1, p. 455, that 'the point in discussion always is whether, in fact, the defendant could have taken a fatal exception to the former indictment; for if he could, no acquittal will avail him.'"

The facts in that case are distinguishable, but inasmuch as in the present case the appellant could have taken a fatal objection to the proceedings upon the first hearing it is difficult to contend that the ground of the decision in *Rex* v. *Marsham* (2) does not cover the present case.

A. H. Bodkin, for the respondent. The withdrawal of the summons on the first hearing was not equivalent to a dismissal of it. The justices allowed the summons to be withdrawn. No certificate of dismissal could have been granted, because under the Summary Jurisdiction Act, 1848, the certificate can only be granted after a hearing on the merits. In the present case there was an informality on the first hearing which went to the jurisdiction of the Court. The justices could not have legally convicted, for the conviction would have been without jurisdiction. The decision in *Pickavance* v. *Pickavance* (1) was upon very special facts. In giving judgment Sir F. Jeune P. said: "In the present instance I do not know that it is necessary to go so far as

(1) [1901] P. 60. (2) [1912] 2 K. B. 362.

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that" (i.e., to hold that the first summons having been withdrawn it would not be practicable to found a fresh summons upon the same complaint), "because there was, in fact, a subsequent complaint alleged by the wife, and therefore whether or not, as a matter of principle, the withdrawal affected the first complaint, in this case I have no doubt that the subsequent second complaint was the only one that was acted upon; and that was out of time." In *Rex* v. *Justices of Tyrone* (1) the decision in *Pickavance* v. *Pickavance* (2) was discussed by Palles C.B., whose criticism goes far to destroy its authority except with regard to any case in which the facts are exactly the same.

RIDLEY J. The Court is of opinion that the decision of the justices can be supported. It appears that in the first instance proceedings were instituted against the appellant for using his house for the purpose of betting. After the case had proceeded some little way it was discovered that the appellant had not been informed of his right to be tried by a jury under s. 17 of the Summary Jurisdiction Act, 1879. When that was discovered the summons was withdrawn by the prosecution with the consent of the justices, notwithstanding the protest of the appellant, and the subsequent proceedings were taken. The question is whether the appellant can substantiate his contention that he has been previously acquitted and is therefore in the position of being able to plead autrefois acquit.

In *Rex* v. *Marsham* (3) the applicant was convicted by a metropolitan magistrate of obstructing a police officer in the execution of his duty. After the applicant had been convicted it was discovered that one of the witnesses for the prosecution had not been sworn. The attention of the magistrate having been directed to that fact, he reheard the case. The witness was recalled and gave evidence after being duly sworn, and the applicant, after having been given an opportunity of calling evidence, was again convicted. The objection was afterwards taken in the Divisional Court that the second conviction was bad because the applicant had been put in peril upon

(1) [1912] 2 I. R. 44. (2) [1901] P. 60.
(3) [1912] 2 K. B. 362.

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the first occasion, but the Court decided that that was not so. Lord Alverstone C.J., in delivering judgment in that case, said: "In order to set aside the second conviction the applicant must shew that the magistrate has done something on the previous hearing which either exhausted his jurisdiction to rehear or which made it unjust that the applicant should be put on her trial in regard to the offence charged. In my judgment the magistrate, finding out that upon the first hearing he had had before him evidence which was not admissible and had therefore not heard and determined the case according to law, was entitled in the exercise of his jurisdiction to have the case heard and tried before him on proper evidence."

It appears to the Court that the objection taken in the present case is of precisely the same nature as that taken in *Rex* v. *Marsham* (1), and that the only distinction is that in the present case it is said that the withdrawal of the summons is equivalent to a dismissal of the summons after an acquittal on the merits, whereas in *Rex* v. *Marsham* (1) it was the previous conviction that was relied upon as a bar to the second conviction. But the Court thinks that the withdrawal of the summons is not equivalent to the dismissal of the summons in consequence of an acquittal on the merits. On behalf of the appellant the decision in *Pickavance* v. *Pickavance* (2) was relied upon, but the judgments in *Rex* v. *Justices of Tyrone* (3) shew that the decision in *Pickavance* v. *Pickavance* (2) must be read with certain limitations, and that where there is a withdrawal of a summons owing to a technical informality which deprives the magistrate of jurisdiction that decision does not apply. The objections raised by the appellant fail, and the appeal must be dismissed.

PICKFORD J. I agree. The summons was withdrawn by the prosecution owing to the discovery of a defect which if the case had proceeded and been decided against the appellant would have made the conviction liable to be quashed, namely, that the appellant had not been informed before the proceedings began that he had the right to be tried before a jury. The first

(1) [1912] 2 K. B. 362.
(2) [1901] P. 60.
(3) [1912] 2 I. R. 44.

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question is whether the withdrawal of the summons in these circumstances is equivalent to a dismissal which could be pleaded in bar of subsequent proceedings. In *Pickavance* v. *Pickavance* (1) the Court seems to have decided that a withdrawal of a summons in the circumstances of that case may amount to an acquittal. But where the withdrawal of the summons has not been on the merits of the case but upon a preliminary point the withdrawal is not equivalent to a dismissal or acquittal. That was decided in *Foster* v. *Hull.* (2) In the present case if the justices had proceeded to adjudicate on the first summons they would have adjudicated upon something upon which they had no power to adjudicate. In my opinion a withdrawal of a summons in such circumstances does not amount to a dismissal which could be pleaded in bar. I also think that the present case falls within the decision of the Divisional Court in *Rex* v. *Marsham.* (3) The appeal must therefore be dismissed.

AVORY J. I agree that the withdrawal of the summons in the particular circumstances of this case did not amount to a dismissal or an acquittal. Even if it did, as the justices had no jurisdiction to hear and determine the summons, their decision could not be pleaded in bar to subsequent proceedings.

Appeal dismissed.

Solicitors for appellant: *Nicholls, Herbert & Co., for Arthur Willey, Leeds.*

Solicitors for respondent: *Smith, Rundell & Dods, for J. Henry Field, Huddersfield.*

(1) [1901] P. 60. (2) 33 J. P. 629.
(3) [1912] 2 K. B. 362.

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1913
April 17.

ATTORNEY-GENERAL *v.* PEEK AND OTHERS.

Revenue—Estate Duty—Settlement Estate Duty—Advowson—Proceeds of Sale—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 24—*Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 15, *sub-s.* 4.

Sect. 15, sub-s. 4, of the Finance Act, 1894, provides that estate duty shall not be payable in respect of any advowson which would have been free from succession duty under s. 24 of the Succession Duty Act, 1853.

Sect. 24 of the Succession Duty Act, 1853, provides that "A successor shall not be chargeable with duty in respect of any advowson . . . . comprised in his succession unless the same . . . . shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth, for which the same . . . . shall be so disposed of, at the time of such disposal."

H., who died in 1898, by his will settled property, including certain advowsons, upon his son C. for life, with remainder to his grandson W. for life, with remainders over. C. died in 1901 without having sold the advowsons. In 1909 W., in exercise of his powers as tenant for life under the Settled Land Acts, sold the advowsons, and the proceeds of sale were paid to the trustees of H.'s will. The advowsons were not included in any estate duty account rendered in connection with the death of either H. or of C. Upon a claim by the Crown that, upon the sale of the advowsons, estate duty and settlement estate duty became payable as on the death of H., or alternatively as on the death of C. upon the amount of the proceeds of sale, or alternatively upon the principal value of the advowsons as at the death of H., or alternatively of C.:—

Held, affirming the decision of Hamilton J. [1912] 2 K. B. 192, that neither estate duty nor settlement estate duty was payable upon the principal value of the advowsons nor upon the proceeds of sale thereof.

APPEAL from a decision of Hamilton J. (1) declaring, upon an information at the suit of the Attorney-General on behalf of His Majesty, that estate duty and settlement estate duty were not payable upon the principal value of certain advowsons or upon the proceeds of the sale thereof respectively.

The defendants to the information were Sir Wilfred Peek, Baronet, the tenant for life in possession under the will of the late Sir Henry William Peek, and the trustees of the will.

(1) [1912] 2 K. B. 192.

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The facts alleged in the information and not disputed by the defendants were as follows:—

By his will, dated May 13, 1898, Sir Henry William Peek, of Rousdon, in the county of Devon, Baronet, deceased, after appointing his son Cuthbert Edgar Peek (afterwards Sir Cuthbert Edgar Peek, Baronet, and since deceased) to be the sole executor thereof, and appointing the defendants other than Sir Wilfred Peek, Baronet, to be trustees thereof, devised certain lands and hereditaments, the advowsons of the parishes of Rousdon and Drewsteignton in the county of Devon, Cranleigh in the county of Surrey, and St. Magnus, London Bridge, and all rights thereto respectively belonging, to the use of his said son Cuthbert Edgar Peek during his life without impeachment of waste, with remainder to the use of his (the testator's) grandson, the defendant Sir Wilfred Peek, during his life without impeachment of waste, with remainder to the use of the defendant Sir Wilfred Peek's first and every other son severally and successively according to seniority in tail male with divers remainders over. And the testator declared that during the subsistence of the settlement thereby made of the premises the trustees of his will should have a power of sale over the premises except the several advowsons thereinbefore mentioned, and also that the trustees should in connection with the settled premises be trustees for the purposes of the 42nd section of the Conveyancing and Law of Property Act, 1881. The testator died on August 26, 1898.

The estate duty payable upon the aggregate net value of the testator's real and personal estate which passed on his death (other than the advowsons) was duly paid, and the settlement estate duty which became payable as on the testator's death upon the principal value of the real estate (other than the advowsons) was also duly paid.

Sir Cuthbert Edgar Peek died on July 6, 1901, and thereupon the defendant Sir Wilfred Peek became tenant for life in possession under the limitations contained in the will. All estate duty which became payable on the death of Sir Cuthbert Edgar Peek on the aggregate net value of his personal and real estate which passed on his death was duly paid.

At the date of the death of Sir Cuthbert Edgar Peek no sale had been made of the advowsons, nor was either advowson included in any estate duty account which was rendered in connection with his death. On October 9, 1905, the defendant Sir Wilfred Peek attained the age of twenty-one years. On March 8, 1909, Sir Wilfred Peek as tenant for life under the will, by virtue of the powers conferred upon him by the Settled Land Acts, 1882 to 1890, sold the advowson of Drewsteignton for the sum of 1840*l.* 10*s.*, which was duly paid by the purchaser to the defendants, the trustees of the will.

On August 6, 1909, Sir Wilfred Peek similarly sold the advowson of Cranleigh for 1450*l.*, which sum was duly paid by the purchaser to the said trustees.

The information alleged that in the circumstances hereinbefore appearing estate duty at the rate of 7 per cent. and settlement estate duty at the rate of 1 per cent. became, under the provisions of the Finance Act, 1894 (57 & 58 Vict. c. 30), and the Finance Act, 1896 (59 & 60 Vict. c. 28), payable as on the death of either Sir Henry William Peek or (alternatively) Sir Cuthbert Edgar Peek, upon the respective sums of 1840*l.* 10*s.* and 1450*l.*, or (alternatively) upon the principal value as at the death of either Sir Henry William Peek or (alternatively) Sir Cuthbert Edgar Peek, of the respective advowsons of Drewsteignton and Cranleigh.

Upon these facts Hamilton J. held that neither estate duty nor settlement estate duty was payable upon the principal value of the advowsons nor upon the proceeds of sale thereof.

From this decision the Attorney-General appealed.

Austen-Cartmell (*Sir Rufus Isaacs, A.-G.*, with him), for the Crown. Sir Wilfred Peek is under the limitations of his grandfather's will entitled as tenant for life to property, namely, the proceeds of sale of the advowsons, in respect of which duty has never been paid. The question is whether any and if so what effect is to be given to s. 15, sub-s. 4, of the Finance Act, 1894. Sect. 1 of that Act is in the widest possible terms. What passed on Sir Henry's and Sir Cuthbert's respective deaths was not only the actual advowsons but the

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proceeds of sale thereof if and when they were sold. There was on each death a contingent liability to duty which would become an actual liability upon a sale taking place. The Crown would then be entitled to duty on one of the deaths though not on both. It could elect on which death it would claim the duty.

By s. 7, sub-s. 5, the principal value of any property chargeable to duty shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased; and by sub-s. 6, where an estate includes an interest in expectancy, estate duty may be paid when the interest falls into possession. Under s. 22, sub-s. 1 (*f*), "property" includes real property and personal property and the proceeds of sale thereof respectively; and by sub-s. 1 (*l*) the expression "property passing on the death" includes property passing either immediately on the death or after any interval, either certainly or contingently.

By s. 5, sub-s. 1, settlement estate duty is made payable when property, in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property. Here the advowsons were in settlement at the deaths of Sir Henry and Sir Cuthbert and passed to Sir Wilfred, a person not competent to dispose of them. By sub-s. 2 of the same section, if estate duty has already been paid in respect of any settled property since the date of the settlement, estate duty is not payable in respect thereof until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property. In this case estate duty having been paid in respect of the settled property on the death of Sir Henry Peek, the settled property which passed on the death of Sir Cuthbert was freed from any further estate duty. But any part of the settled property upon which estate duty was not paid on the death of Sir Henry became liable to duty on the death of Sir Cuthbert. No estate duty on the advowsons having been previously paid, when they were sold by Sir Wilfred they became liable to duty.

Sect. 8, sub-s. 4, makes Sir Wilfred and the trustees accountable for the estate duty, but by s. 9, sub-ss. 6 and 7, the duty is ultimately payable not by Sir Wilfred personally but out of the property in respect of which it is paid. Sect. 4 provides for the aggregation of all the property passing on the death of the deceased. When an advowson by reason of sale becomes liable to duty a fresh aggregation becomes necessary. Sect. 8, sub-s. 4, makes the person to whom the property passes liable for the duty in respect thereof where the executor is not accountable for it, and s. 9, sub-s. 1, charges the duty on the property; see also ss. 11 and 13. The advowsons to which Sir Wilfred succeeded constituted property which was capable of becoming an income-bearing fund. By selling the advowsons he has made himself liable to duty as at the death of Sir Henry or Sir Cuthbert. The Crown can elect on which death it will claim.

[BUCKLEY L.J. There is a difference between estate duty and succession duty in this, that the former is a proportion of the dead man's estate which is taken by the State, while the latter is a sum of money which is claimed and taken away from the person who succeeds to the estate.]

[*Danckwerts, K.C.*, for the respondents, referred to what was said by Lord Loreburn in *Winans* v. *Attorney-General.* (1)]

Yes, the distinction is well known.

Sect. 20 of the Finance Act, 1896, deals with a case similar to that of an advowson, namely, where objects of national, scientific, or historic interest, when settled so as to be enjoyed in succession, are exempted from duty and only made liable when they are sold or are in the possession of some person who is competent to dispose of the same. The person selling and the person being in possession and competent to dispose of the same is made accountable to duty and has to deliver an account.

Similarly under s. 61, sub-s. 5, of the Finance (1909-10) Act, 1910, estate duty on growing timber is made payable on the proceeds of sale from time to time received when the timber is felled, and s. 63 of the same Act shews the final development of the machinery applicable to the exemption from duty of objects

(1) [1910] A. C. 27, at p. 30.

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of national, scientific, or historic interest. Those sections seem to throw some light upon the present case.

[BUCKLEY L.J. The circumstances are wholly dissimilar to my mind.]

Sect. 15, sub-s. 4, is an exemption only sub modo. It only exempts advowsons if and so long as they fulfil the conditions of s. 24 of the Act of 1853, i.e., of not being sold by the successor. If they are sold there is nothing to except the proceeds of sale. These advowsons have been sold by a successor and consequently they or the proceeds thereof are liable to duty. The date as on which the duty is leviable may conveniently be taken to be the death of Sir Cuthbert. The advowsons passed at his death, and up to that time the conditions of s. 24 had been satisfied, namely, the advowsons had not been sold.

Danckwerts, *K.C.*, *Dighton Pollock*, and *Devonshire*, for the respondents, were not called upon.

COZENS-HARDY M.R. This case has been very ably argued by Mr. Cartmell, and we have paid all the attention we can to his argument. I feel no doubt that the decision appealed from is correct. The point is really a short one. Sir Henry Peek had a large fortune, and duty was payable at the rate of 7 per cent. on his estate. His estate consisted of real property, and also of advowsons, which are real property within the meaning of the Act, but a very peculiar species of property. Now at Sir Henry's death was estate duty payable in respect of those advowsons? In my opinion, plainly not. It is true that under the language of the charging section, s. 1, if you stop there, the advowsons would be swept in, and, whatever their value might be, sold or not sold, it would have to be taken and brought into account. But then comes s. 15, which is an exemption clause. Sect. 15, sub-s. 1, excludes certain annuities; and sub-s. 3 similarly excludes pensions or annuities payable by Government to certain persons. Then sub-s. 4 provides that "Estate duty shall not be payable in respect of any advowson or church patronage which would have been free from succession duty under section 24 of the Succession Duty Act, 1853." That brings us to s. 24 of the Act of 1853, which says: "A successor

shall not be chargeable with duty in respect of any advowson or church patronage comprised in his succession, unless the same or some other right of presentation, or some other interest in or out of such advowson or church patronage, shall be disposed of by or in concert with him for money or money's worth, in which case he shall be chargeable with duty upon the amount or value of the money or money's worth for which the same or any such presentation or interest shall be disposed of at the time of such disposal." Now I cannot give any meaning whatever to s. 15, sub-s. 4, and its reference to s. 24 of the Succession Duty Act, if it does not amount in the present case to saying this: Sir Henry had advowsons; he was liable to estate duty in respect of the whole of his estate, but those advowsons so long as they were unsold were not part of his estate liable to estate duty. The account was rendered by the proper persons. The account did not include the advowsons, and that seems to me to have been perfectly right. Under Sir Henry's will a life estate was given to Sir Cuthbert, his eldest son, and a second life estate to the present baronet, Sir Wilfred, who is his grandson. Nothing happened in Sir Cuthbert's life. He did not sell the advowsons, and, although it is not very material, I may observe that Sir Henry in his will expressly prohibited the trustees of the will from selling these advowsons. On Sir Cuthbert's death Sir Wilfred came into possession. He attained twenty-one, and in the year 1909, by virtue, not of any power in the will but by virtue of the statutory authority which he possessed under the Settled Land Acts, he contracted to sell, and did sell, two of the advowsons for a considerable sum of money which was paid to the trustees, and is no doubt in their hands as capital money under the Settled Land Acts. It is said: Even if it be true that the advowsons were not chargeable on the death of Sir Henry or on the death of Sir Cuthbert, yet the fact that Sir Wilfred as tenant for life, acting under the powers of the Settled Land Acts, has turned those two advowsons into money has a sort of retrospective effect; although they were not chargeable at the moment of Sir Henry's death, and although no blame could be attached to anybody for not having brought them in, there was a sort of notional possibility of a subsequent sale by

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some person claiming an interest as a successor, a sort of notional possibility which has a retrospective effect in some way, and makes estate duty payable more than a quarter of a century after Sir Henry's death, in respect of the sale moneys of those advowsons. I am entirely unable to accept that view. I think the true view is that which the learned judge has taken, that those advowsons are excluded from the charging clause so long as they are advowsons, so long, I mean, as they are unsold advowsons, and that it would be altogether irrational and unreasonable to say, as I think you must if the argument of Mr. Cartmell is right, that under a charging Act of this kind estate duty is payable in respect of Sir Henry's estate by virtue of this transaction which took place many years after his death, and which is the voluntary act of a successor under the limitations of his will, that is to say, Sir Wilfred. There is nothing, as it seems to me, in the Act which really fits this case, or in any way operates to charge estate duty, in respect of these advowsons, upon the testator's estate. We have had a great deal of discussion, and properly so, upon the true meaning of s. 15, sub-s. 4. I think it means what it says. "Estate duty shall not be payable on any advowson or church patronage which would have been free from succession duty." Would these advowsons have been free from succession duty at Sir Henry's death? Plainly yes. I think there is no doubt about that at all. Were they free from succession duty at Sir Cuthbert's death? Again I say, plainly yes. When they were sold there may or may not have been succession duty payable; that is not before us, and I am not obliged to express any opinion upon it, but the utmost that can be said is that succession duty was payable, and only payable, after the sale, and only by the person who was then tenant for life, namely, the present Sir Wilfred, who, and who alone, was the person who would pay succession duty. How, in the face of these two sections, s. 15, sub-s. 4, of the Finance Act, 1894, and s. 24 of the Succession Duty Act, 1853, it can be made out that either Sir Henry's estate or Sir Cuthbert's estate is liable for the purpose of duty to be augmented by the purchase-money realized by Sir Wilfred's sale, really passes my understanding. I am quite content with the judgment of

Hamilton J., and I think, notwithstanding the able argument that we have listened to from Mr. Austen-Cartmell, the decision appealed from was perfectly right, and this appeal must be dismissed, with the usual consequences.

BUCKLEY L.J. The difficulties of this case largely disappear if there be borne steadily in mind the essential difference between estate duty and succession duty or legacy duty. Estate duty is a certain percentage of property passing upon the death of a dead man; that which remains to be beneficially dealt with is only the difference between that which passes and the percentage which the State is going to take out of it. Legacy and succession duty are sums of money which are taken away from those who become beneficially entitled under the dead man's will. Bearing that in mind, I confess I do not feel much difficulty in this case. For the sake of brevity and clearness I am going to consider the case simply at Sir Henry's death. At his death he was entitled to an advowson. At his death it was necessary, under s. 1 of the Finance Act, to ascertain what property passed. The advowsons formed part of it. It was necessary as early and as accurately as possible to ascertain the aggregate value of all the property which passed, including these advowsons. That could not be done at once, of course, but it must be treated as if it had been done at once. Upon that aggregate value a percentage was to be paid according to the amount which might be reached as being the total value of the property passing. That had to be done when the testator died, or as soon after as might be. Part of the property consisted of advowsons, and by s. 15, sub-s. 4, of the Act of 1894 there was no duty payable in respect of those advowsons. The section provided that "estate duty should not be payable in respect of any advowson or church patronage which would have been free from succession duty under section 24 of the Succession Duty Act, 1853." When the testator died there would have been no succession duty payable under the Act, because the advowsons had not been sold; they remained advowsons. What happened was that Sir Henry died and Sir Cuthbert succeeded him; then Sir Cuthbert died and Sir Wilfred succeeded him, and, many years after, Sir Wilfred

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Buckley L.J.

sold the advowsons. It is said that that affects the property which passed upon Sir Henry's death for the purpose of ascertaining the estate duty payable by Sir Henry's estate, and it is said, and truly, that under s. 22, sub-s. 1 (*f*), of the Act we must read "property" as if it included "proceeds of sale thereof," and it is said that the money was the proceeds of sale of the advowsons, which is true, and that therefore we ought to say that the proceeds of sale of the advowsons passed at his death. I decline to say anything of the kind. They did not. What he owned at his death was certain advowsons excepted from the incidence and obligation of estate duty. They were subsequently sold. He never had any interest in the moneys arising from the sale. He had neither a present nor a future interest, neither vested nor contingent; he had no interest in them at all. Those moneys arose from the voluntary act of Sir Wilfred, who thought proper, a good many years later, to do a particular act, an act which it may be for the purposes of succession duty called into effect s. 24 of the Act of 1853, but which to my mind had no effect at all upon the estate duty payable in respect of Sir Henry's estate. He simply owned and died possessed of, and there passed upon his death, a property which was not subject to this duty.

On these grounds I think the decision of Hamilton J. was quite right, and this appeal should be dismissed with costs.

KENNEDY L.J. I am entirely of the same opinion, and for the reasons given. I confess it seems to me a very plain case.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Johnson, Raymond-Barker & Co.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1913
April 29.

ATTORNEY-GENERAL *v.* CORPORATION OF THE CITY OF LONDON.

Revenue—Corporation Duty—Mortgage—Property belonging to or vested in any Body Corporate or Unincorporate—Trustees—Permanent Trusts—Fund for Redemption of Debenture Stock issued by Corporation—Liability of Income of Fund to Duty—Customs and Inland Revenue Act, 1885 (48 & 49 *Vict. c.* 51), *ss.* 11, 12.

In June, 1897, the Corporation of the City of London, for the purpose of paying off a debenture debt and of raising further moneys, created an issue of debenture stock. In connection with the issue an indenture was executed on June 24, 1897, between the Corporation and certain officials of the City of London, who (including their successors in office) were described as "the trustees," to secure the redemption of the proposed stock.

By the indenture the Corporation charged in favour of the trustees in trust for the stockholders all rents and income derived from their freehold and leasehold estates, and also other income of the Corporation, with the payment of all moneys for the time being owing on the security of the indenture. It was also provided that for better securing and providing for the redemption of the stock the Corporation should out of their annual income, after providing for the annual interest on the stock, set aside, on January 1 and July 1 in every year, so long as any of the stock should remain unredeemed, half-yearly sums of 7500*l.*, and should invest all such half-yearly sums and the resulting income thereof from time to time; and that the fund so created should be applied by the Corporation towards the redemption of the stock, after it should have become redeemable. The stock was redeemable in 1927, or, if not previously redeemed, in 1957. Certain powers were conferred upon the trustees in case of default by the Corporation in the performance of their obligations under the indenture. Since the date of the deed the half-yearly sums of 7500*l.* had been regularly invested in the purchase of stock in the names of the trustees. The dividends and interest from the investments were as they arose applied by the Bank of England in the purchase of similar stocks. The purchases and investments were made with the consent of the Corporation and at the request of the trustees. This sinking fund now amounted to a large sum, partly invested in India 2½ per cent. Stock, and the Crown claimed 75*l.* 19*s.*, being the corporation duty on the income of the India Stock for the year:—

Held, affirming on this point the decision of Horridge J. [1913] 1 K. B. 201, that the equity of redemption in the fund belonged to the

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1913

ATTORNEY-GENERAL v. CITY OF LONDON CORPORATION.

Corporation; and that the income of the India Stock ought to be brought into account in the Crown's account against the Corporation for corporation duty.

APPEAL from a decision of Horridge J., reported [1913] 1 K. B. 201.

By writ of subpœna the informant, the Attorney-General, claimed from the defendants the sum of 75*l.* 19*s.* in respect of corporation duty for the year 1909-10 based on income for the yearly period January 1 to December 31, 1908, that period being accepted by the Commissioners of Inland Revenue for the convenience of the defendants in lieu of the statutory yearly period April 6, 1908, to April 5, 1909. The parties concurred in stating the questions of law arising in the following case for the opinion of the Court. The defendants the Mayor and Commonalty and citizens of the City of London are referred to as "the Corporation," and the other defendants were the Lord Mayor of London, the Governor of the Bank of England, and the Chamberlain of the City of London.

By s. 11 and following sections of the Customs and Inland Revenue Act, 1885 (1), a duty known as corporation duty (subject

(1) Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 11: "Whereas certain property, by reason of the same belonging to or being vested in bodies corporate or unincorporate, escapes liability to probate, legacy, or succession duties, and it is expedient to impose a duty thereon by way of compensation to the revenue: Be it therefore enacted, that there shall be levied and paid to Her Majesty in respect of all real and personal property which shall have belonged to or been vested in any body corporate or unincorporate during the yearly period ending on the fifth day of April one thousand eight hundred and eighty-five, or during any subsequent yearly period ending on the same day in any year, a duty at the rate of five pounds per centum upon the annual value, income, or profits of such property accrued to such body corporate or unincorporate in the same yearly period, after deducting therefrom all necessary outgoings, including the receiver's remuneration, and costs, charges, and expenses properly incurred in the management of such property . . . ."

Sect. 12: "In the construction and for the purposes of this part of this Act—

"The term 'body unincorporate' includes every unincorporated company, fellowship, society, association, and trustee, or number of trustees, to or in whom respectively any real or personal property shall belong in such manner, or be vested

to certain exemptions) is to be levied at the rate of 5*l.* per cent. upon the annual value, income, or profits of all real and personal property belonging to or vested in any body corporate or unincorporate.

By an indenture dated June 24, 1897, and made between the Corporation of the one part and the then Lord Mayor, the Governor of the Bank of England, and the then Chamberlain of the City of London of the other part, it was recited among other things that the Corporation had determined to create from time to time debenture stock to be constituted and secured in the manner thereinafter appearing, and had agreed with the Governor and Company of the Bank of England with reference to the issue and transfer of such stock and the payment of the interest thereon and the management thereof.

The indenture contained provisions for the issue and limits of the stock, for the payment of interest at the rate of 2½ per cent. per annum, and for the creation of a charge in favour of the trustees (who were to be the Lord Mayor, the Governor of the Bank of England, and the Chamberlain for the time being) in trust for the stockholders on all rents and income derived from the freehold and leasehold estates of the Corporation, and also other incomes of the Corporation.

By clause 1 it was provided (inter alia) that "'The stockholders' means as regards stock not represented by certificates to bearer the several persons for the time being registered in the register of stockholders to be kept by the Bank as provided in the second schedule hereto as holders of the stock and as regards stock represented by certificates to bearer the bearers for the time being of such certificates.

"'The Bank' means the Governor and Company of the Bank of England."

Clause 2. "As and when the stock or any part thereof ought

upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty."

By the Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), s. 11 of the Customs and Inland Revenue Act, 1885, was repealed to "enacted, that" but the repealed portion of the section is set out in order that the reference to it in the arguments and judgment may be conveniently followed.

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to be redeemed in accordance with the conditions set forth in the second schedule hereto the Corporation shall pay to the stockholders or their representatives the full amount of the stock held by them respectively and such payment shall operate in satisfaction of the stock so redeemed and in the meantime until the stock is redeemed the Corporation shall pay to the stockholders or their representatives interest on the stock held by them respectively at the rate of two pounds ten shillings per centum per annum by half-yearly payments on every first day of January and first day of July."

Clause 3. "The stock shall be issued and held subject to the conditions set forth in the second schedule hereto and such conditions shall be binding on the Corporation and the stockholders and their representatives and all persons claiming through them respectively."

Clause 4. "The total amount of the stock to be created as aforesaid shall not exceed 4,000,000*l.* (four million pounds sterling) save and except that such sum may be exceeded if the Corporation shall think fit for the purpose of raising money to be laid out by them in the purchase of freehold or leasehold messuages buildings lands or other hereditaments or in the erection construction or improvement of any messuages buildings works or other things of a permanent nature upon any lands for the time being belonging to the Corporation Provided always that no person taking any of the stock shall be concerned to inquire as to the purpose for which it is created or to see to the application of the moneys raised by the issue thereof."

Clause 5. "The Corporation hereby charge in favour of the trustees in trust for the stockholders all the rents and income derived from the freehold and leasehold estates and all the tolls dues stallages rents and revenues of or to which the Corporation now are or at any time or times hereafter shall become seised possessed or entitled otherwise than as trustees or mortgagees with the payment of all moneys for the time being owing on the security of these presents."

Clause 7. "For better securing and providing for the redemption of the stock in accordance with the conditions set forth in the second schedule hereto the Corporation shall create a fund as

hereinafter mentioned that is to say the Corporation shall out of their annual income after providing for the annual interest on the stock set aside on the first day of January and the first day of July in every year so long as any of the stock shall remain unredeemed the half-yearly sums of seven thousand five hundred pounds and shall invest all such half-yearly sums in or upon investments authorized by law for the investment of trust funds or in or upon such other investments as the Corporation shall think fit with full power to vary such investments and shall accumulate the income of such investments by similarly investing the same and the resulting income thereof from time to time and the said fund so created shall be applied by the Corporation in or towards the redemption of the stock after the same shall have become redeemable under the conditions set forth in the second schedule hereto."

Clause 8. "The security hereby constituted shall become enforceable in either of the following events and in no other event that is to say:—

"(1.) If the Corporation shall make default in the payment of any principal moneys or interest which ought to be paid in accordance with these presents and the trustees shall after such default and before the payment of such principal moneys or interest be requested by extraordinary resolution of the stockholders to enforce the security hereby constituted and the Corporation shall for twenty-eight days after receiving notice of such resolution fail to make such payment or

"(2.) If the Corporation shall make any other default in the performance of any of the covenants or obligations herein contained and shall for twenty-eight days after being required in writing by the trustees to remedy or make good the same fail to comply with such requisition and the trustees shall after such failure be requested by an extraordinary resolution of the stockholders to enforce the security hereby constituted and the Corporation shall for twenty-eight days after receiving notice of such resolution still fail to comply with such requisition."

Clause 10. "At any time after the security hereby constituted shall become enforceable the trustees may apply to the High Court of Justice for an order that the trusts hereof be carried

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into execution under the direction of the Court and for the appointment of a receiver or receivers of the said premises hereinbefore charged or any part or parts thereof or subject to the proviso next herein contained for any other order in relation to the administration of the trusts hereof or the enforcement of the security hereby made as the trustees shall deem expedient and the trustees shall be indemnified by the Corporation against all the costs and expenses incurred by or in relation to any such application or proceedings Provided always that the trustees shall have no power to sell and neither the trustees nor the stockholders shall be entitled to apply to the Court for or compel any sale of the said premises hereinbefore charged or any of them."

Clause 31. "The Corporation hereby covenant with the trustees that the Corporation will duly perform and observe all the obligations imposed on the Corporation by these presents."

Clause 32. "It shall not be incumbent on the trustees to give notice to any person or persons of the execution of these presents or to see to the performance or observance by the Corporation of any of the covenants or obligations herein contained or in any way to interfere with or supervise the acts or conduct of the Corporation unless and until the security hereby constituted shall become enforceable and the trustees shall not be deemed to commit a breach of trust or incur any liability whatsoever by neglecting or omitting so to do."

"THE SECOND SCHEDULE HEREINBEFORE REFERRED TO.

"Conditions as to Issue of Debenture Stock.

"The following are the conditions upon which the debenture stock is to be issued.

"1. The Corporation may give to the stockholders or their representatives not less than six calendar months' notice of the intention of the Corporation to redeem the stock at par on the first day of July 1927 and if such notice shall be given the stock will be redeemed accordingly. The stock if not previously redeemed will be redeemed at par on the first day of July 1957 or as soon as the security hereby constituted shall become enforceable and as and when the stock ought to be redeemed in accordance with these presents the Corporation will subject to

these conditions pay to the stockholders or their representatives the redemption moneys for the same. Such payments will be made at the Bank of England . . . . and as from the time fixed by any such notice for the redemption of the stock it shall cease to carry interest.

. . . . .

"18. Subject to the conditions hereinafter mentioned every person registered in the register of stockholders as entitled to any stock may obtain from the Bank a certificate or certificates of title to his stock or to part thereof transferable by delivery and with coupons annexed entitling the bearer of the coupons to the interest payable in respect of that stock or part of stock . . . ."

. . . . .

On June 28, 1897, the defendants the Corporation issued a prospectus inviting tenders for an issue of 1,250,000*l.* of the debenture stock. The prospectus (so far as material) was as follows:—

"Corporation of London £2½ per cent. Debenture Stock.
"Interest payable half-yearly, 1st January and 1st July, at the Bank of England.
"First Issue of £1,250,000, part of £4,000,000.
"Minimum price of Issue £101 per cent.
"Issued under the authority of the Corporation of London, on the security of the Trust Deed constituting and securing the Debenture Stock.
"Trustees for Debenture Stockholders:
"The Right Honourable the Lord Mayor.
"The Governor of the Bank of England.
"The Chamberlain of London.

"The Corporation of London give notice that they will be prepared to receive on the sixth day of July, 1897, at the Bank of England, sealed tenders for £1,250,000 of Corporation of London 2½ per cent. Debenture Stock. The money is required for providing for the discharge of a portion of the bonded debt of the Corporation and converting the same into debenture stock. The stock is secured by, and is to be held subject to the conditions of, a trust deed . . . . charging all the rents and income derived from the freehold and leasehold estates, and all the tolls,

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dues, stallages, rents and revenues of or to which the Corporation now are or at any time hereafter shall become entitled, otherwise than as trustees or mortgagees. For further securing and providing for the redemption of the stock the Corporation covenant to set aside £15,000 per annum out of their annual income after providing for the annual interest on the stock, and to invest and accumulate such annual sums and the income thereof."

Under and upon the terms stated in the indenture and prospectus the defendants the Corporation from time to time made issues of the debenture stock.

By an indenture dated June 1, 1905, and made between the Corporation of the one part and the then Lord Mayor, the then Governor of the Bank of England, and the Chamberlain of the City of London of the other part, reciting that under the lastly stated indenture the Corporation had from time to time issued stock amounting to 1,642,900*l.* carrying interest at the rate of $2\frac{1}{2}$ per cent. per annum; and that the Corporation were desirous of issuing further parts of the stock intended to be secured by the indenture, but that owing to the state of the money market it might be necessary to pay a higher rate or higher rates of interest than $2\frac{1}{2}$ per cent. on the stock which should be so issued, it was declared that such stock might be issued at a higher rate or higher rates of interest than $2\frac{1}{2}$ per cent. The Corporation had accordingly issued certain debenture stock carrying interest at the rate of 3 per cent. per annum.

The Corporation had since the date of the indenture of June 24, 1897, regularly in January and July in each year carried to the debenture stock sinking fund for the debenture stock holders the half-yearly sums of 7500*l.*, which sums had been regularly invested in the purchase of stock for and in the names of the trustees for the debenture stock holders, and the dividends and interest from those investments were as they arose applied by the Bank of England in the purchase for and in the names of the trustees for the debenture stock holders of similar stocks. On these purchases being effected a stock receipt was obtained by the Chamberlain on behalf of the trustees, and

the Court found as a fact that the purchases were made with the consent of the Corporation and the trustees and at the request of the trustees. The following is a specimen of the stock receipts :—

"Cr. 1872 . . . . . £653 10*s.* 10*d.*
"India £2 10*s.* 0*d.* per cent. Stock.
"Redeemable 5th October, 1926. Bot. @ $69\frac{3}{8}$.

"Received this 11th day of April, 1910, of the Lord Mayor of London, the Governor of the Bank of England, the Chamberlain of London, all for the time being hereinafter called the said transferee, the sum of four hundred and fifty-three pounds 7*s.* 11*d.* being the consideration for six hundred and fifty-three pounds ten shillings and tenpence interest or share in the capital £2 10*s.* 0*d.* per cent. stock created under Act of Parliament enabling the Secretary of State in Council of India to raise money in the United Kingdom for the service of the Government of India, transferable at the Bank of England, and all my property and interest in and right to the same, and the dividends thereon by me this day transferred to the said transferee . . .

Mullens Marshall & Co. Stamp 1*s.*

	£	*s.*	*d.*
	453	7	11
"Stamp . . .	0	1	0
"Commission divisible with the Bank .	0	16	4
	£454	5	3

"Witness my hand,
"J. W.

"Witness "Attorney to
"R. Youlton. "W. V. Heale. A. H. M. Praed."

The defendants contended that by so acting they were acting under and in order to carry out the provisions of the indenture of June 24, 1897, and in discharge of their liabilities and responsibilities under clause 7 thereof, but this contention was not admitted by the Attorney-General.

The trustees were specially named and appointed under and for the purposes of the indenture of June 24, 1897, and it was

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contended by the defendants—but this contention was not admitted by the Attorney-General—that the trustees held the stocks as trustees for the debenture stock holders for the purposes of the sinking fund provided for by the indenture of June 24, 1897, and that none of the stocks nor the income arising therefrom nor any part thereof could be dealt with or transferred except by the trustees. According to the custom and practice of the Corporation the trustees for the Corporation were the Chamberlain, the Town Clerk, and the Comptroller of the Chamber of the City of London for the time being, and the sums of money belonging to the Corporation in its corporate capacity were invested in their names and the dividends arising from those investments were received by them as directed by the committee of the Corporation having the control of the funds.

It was admitted by the parties that a decision as to income from any one of the investments would govern the whole income of the sinking fund, and for simplicity and convenience this case was limited to one particular investment, namely, India 2½ per cent. Stock.

The details as to the sinking fund investments so far as the particular investment to which this case relates were as follows:—On January 1, 1908, there was in the sinking fund 61,665*l.* 14*s.* 8*d.* India 2½ per cent. Stock; on December 31, 1908, there was 63,624*l.* 19*s.* 5*d.* of this India 2½ per cent. Stock. The income arising during the year from this India Stock amounted to 1519*l.* 1*s.* 3*d.* The duty on this 1519*l.* 1*s.* 3*d.* at the rate of 5 per cent., namely, 75*l.* 19*s.*, was the sum now claimed by the Attorney-General.

No part of the debenture stock created under the indentures had been redeemed, and the sinking fund held by the trustees would not be sufficient to redeem the debenture stock which had been created and was outstanding.

The Corporation had duly rendered an account for the purpose of corporation duty of their general income chargeable with corporation duty for the yearly period January 1 to December 31, 1908, and had paid duty on such income. It was admitted that in the account the income derived from the 2½ per cent. India Stock was not included.

On behalf of the Attorney-General it was contended:

(1.) That the income of the 2½ per cent. India Stock hereinbefore referred to was liable to corporation duty under and by virtue of s. 11 of the Customs and Inland Revenue Act, 1885.

(2.) That the stock, although standing in the name of the trustees, belonged to and was in point of law vested in the Corporation.

(3.) That in the alternative the stock was vested in the trustees.

(4.) That in either event the income of the stock falling within the general charge was not within any of the exemptions contained in s. 11.

(5.) That the sum claimed was due and payable by the Corporation or in the alternative by the trustees to the Crown.

On behalf of the defendants it was contended:

(1.) That no part of the income of the 2½ per cent. India Stock was liable to corporation duty.

(2.) That no part of the 2½ per cent. India Stock or the income thereof belonged to or was vested in the Corporation.

(3.) That upon the facts stated in the case the 2½ per cent. India Stock and the income thereof belonged to and were vested in the trustees for the debenture stock holders and for their benefit.

(4.) That no part of the 2½ per cent. India Stock or the income thereof belonged to or was vested in the trustees in such manner as to render the same or any part thereof chargeable to corporation duty.

(5.) That no part of the sum claimed was due or payable by the defendants or by either of them to the Crown.

The question for the opinion of the Court was whether corporation duty was chargeable upon the income of the 2½ per cent. India Stock. If the Court should be of opinion in the affirmative on this question, judgment was to be entered for the Attorney-General for the sum claimed with costs, including the costs of this case and the determination thereof.

If the Court should be of opinion in the negative on this question, judgment was to be entered for the defendants with costs, including the costs of this case and the determination thereof.

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Horridge J. held that the sinking fund belonged to the Corporation; that the trustees held the fund upon such permanent trusts that it was not liable to legacy or succession duty; and that corporation duty was chargeable on the income of the India Stock.

The Corporation appealed.

Danckwerts, K.C., and *A. M. Bremner*, for the appellants. Sect. 11 of the Customs and Inland Revenue Act, 1885, imposes corporation duty on beneficial interests only, just as in the case of legacy and succession duties, which are not payable on the death of a trustee but on the death of the beneficiary. It is true that the recital in s. 11 is repealed by the Statute Law Revision Act, 1898, but by s. 1 of that Act that does not affect the construction of the section. This India Stock is not property which is vested in or belongs to the Corporation: *City of London Brewery Co.* v. *Inland Revenue Commissioners*. (1) The beneficial interest in both capital and income is vested in the debenture stock holders, and if a stockholder dies death duties become payable. A quantity of stock represents a corresponding amount of the indebtedness of the Corporation, and of this debt each stockholder owns an aliquot part. When the time for redemption arrives he will have a right under clause 7 of the deed to have his share of the fund applied in payment of the amount of his stock. The Corporation have no control over the fund.

Secondly, this is not property belonging to an unincorporated body of trustees within s. 12 in such manner and vested upon such permanent trusts that it is not liable to legacy or succession duty. Those duties are payable by the stockholders; therefore the property is exempt from duty. *In re Duty on Estate of New University Club* (2) was relied on in the Court below, but in that case the beneficial interest belonged to the club and the question was whether the funds were acquired by voluntary contributions within s. 11, sub-s. 6, and it has no application to this case. The trustees have nothing belonging to them in a beneficial sense. The fund is an actual sum payable to the stockholders.

(1) [1899] 1 Q. B. 121, 138. (2) (1887) 18 Q. B. D. 720.

Sir John Simon, *S.-G.*, *Tomlin*, and *W. Finlay*, for the Crown. In calculating the amount of the corporation duty the income of the India Stock ought to be brought into the account on one side, but no objection is made to the Corporation bringing in on the other side the outgoings, including the interest payable to the bondholders. These proceedings have been taken in order to settle the question whether this sinking fund belongs to or is vested in the Corporation within s. 11. It is submitted that it does belong to the Corporation and that corporation duty is chargeable on the income of the fund; and further that if the fund belongs to the trustees the income is chargeable under s. 12.

[They were stopped by the Court.]

COZENS-HARDY M.R. This is an appeal from the judgment of Horridge J., and it raises the question whether, in considering the amount of corporation duty payable by the Corporation, one particular item, which is taken as typical of other items in the same class, ought to be brought into account. The question in short is whether a sinking fund constituted pursuant to a deed of 1897 is or is not property belonging to the Corporation, or trustees for the Corporation, within the meaning of ss. 11 and 12 of the Act of 1885.

Now, the Corporation were minded to consolidate their bonded debt; it appears by this deed that there were bonds for upwards of 3,000,000*l.*, and the scheme was this, that the bonds, which were bonds given by a common law corporation, not a municipal corporation under the Act, should have, in addition to other security, the security of a sinking fund to be created by the payment half-yearly of 7500*l.* to trustees, who were the Lord Mayor, the Governor of the Bank of England, and the City Chamberlain, to be invested in their names and accumulated by an investment of the income of such funds in the same names and for the same purposes.

Now, what were the purposes? The bonds which were to be secured were bonds which, according to the second schedule of the deed, might be redeemed on six months' notice in July, 1927, and, if not then redeemed, should be redeemed at par in 1957; but until one or the other of those times arrived the Corporation

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had no power to compel any bondholder to receive his money, no power to release the property charged upon the bonds as security, no power to get at or apply for any other purposes the funds represented by the half-yearly payments of 7500*l.*, and the accumulated interest thereon.

The trust is found in clause 7 of the deed: "For better securing and providing for the redemption of the stock in accordance with the conditions set forth in the second schedule hereto the Corporation shall create a fund as hereinafter mentioned that is to say the Corporation shall out of their annual income after providing for the annual interest on the stock set aside on the first day of January and the first day of July in every year so long as any of the stock shall remain unredeemed the half-yearly sums of 7500*l.* and shall invest all such half-yearly sums in or upon investments authorized by law for the investment of trust funds or in or upon such other investments as the Corporation shall think fit with full power to vary such investments and shall accumulate the income of such investments by similarly investing the same and the resulting income thereof from time to time and the said fund so created shall be applied by the Corporation in or towards the redemption of the stock after the same shall have become redeemable under the conditions set forth in the second schedule hereto." It seems to me that this is property the equity of redemption in which belongs to the Corporation. In 1927, it is quite clear that is so. I cannot conceive an argument to the contrary. The Corporation can, as a matter of right, redeem all the bonds, and having redeemed all the bonds, the trust created by the 7500*l.* half-yearly will have come to an end, and there will be a plain resulting trust for the Corporation. But what in the meantime is their right? It seems to me to be simply this: There is a mortgage which cannot be called in for fourteen years from the present time. That is the real position. The relation of the parties is, none the less, that of mortgagor and mortgagee, because in the meantime the mortgagor is not entitled for his own use to receive the rents and profits of the sinking fund in the same way and to the same extent as the Corporation are entitled to receive the rents and profits of their ordinary funds.

Per contra, this income is to be accumulated in the hands of trustees and is, when the time arrives for redemption, to be applied in payment of, or in aid of the payment of, and so far only as is necessary, for the payment of these bonds. There is, of course, a provision in the deed, to use a word we are more familiar with in connection with limited companies than in a great corporation like this, as to what is to happen if default is made by the Corporation. Then it is said the property does not belong to the Corporation because it cannot touch it for a considerable time, for fourteen years. That does not seem to me to be a vital consideration. It is also said that it is not within the intent and policy and purview of the Act because according to the true meaning of the section the Act refers to property which escapes liability for probate or succession duty. I confess I am unable to follow that branch of the argument. The bondholder will pay the duty—I will call it death duty—upon the value of his bond. That is the estate upon which the duty will be paid. That estate, no doubt, may be worth more in the market by reason of this sinking fund. But it is a fallacy to say that death duty is payable upon this sinking fund. It is not. It is payable only upon the bond debt, the Corporation debt, for which this fund is additional security.

The learned judge has dealt with the case upon two footings. He said either it is the Corporation's liability under the first part of the section, or, if it is a body unincorporate,—a phrase also to be found in this section—that that, according to the definition, includes "every unincorporated company, fellowship, society, association, and trustee, or number of trustees, to or in whom respectively any real or personal property shall belong in such manner, or be vested upon such permanent trusts, that the same shall not be liable to legacy duty or succession duty," and that this fund is thus vested. I confess I feel a difficulty in saying that the case falls within that head or in saying there is here a permanent trust within the meaning of that sub-section. I prefer to base my decision on that which I think was Horridge J.'s primary and substantial view, that this is and always has been and always will be the property of the Corporation, although for a certain number of years by contract

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it has to be applied only in one particular way, and the income of it cannot come into the coffers of the Corporation.

The order which Horridge J. has made and which is under appeal says this: "The Court is of opinion that corporation duty is chargeable upon the income of the 2½ per cent. India Stock, and judgment must be entered for the Attorney-General for the sum claimed." I daresay that was intended to be included as an item in the account in respect of which the Corporation ought to pay duty. In that sense it is quite accurate, but to avoid any possibility of mistake I think it would be better to vary the terms of the order by substituting these words: "That corporation duty upon the income of the 2½ per cent. India Stock in the case mentioned ought to be included as an item in the account of the corporation duty payable by the Corporation." I think this appeal should be dismissed with costs.

BUCKLEY L.J. I regret that the Court should pronounce any decision upon this special case in the form in which it stands, and I think it my duty to go through some of the statements for the purpose of shewing that the case as it stands does not to my mind raise the point upon which the Court is pronouncing a decision. The facts as detailed in the special case are that certain moneys are appropriated to the service of the debt of the Corporation bonds, and that, as the result of that, this sinking fund included on January 1, 1908, 61,665*l.* 14*s.* 8*d.*, and on December 31, 1908, 63,624*l.* 19*s.* 5*d.* India 2½ per cent. Stock. The income arising therefrom in the year was 1519*l.* 1*s.* 3*d.* But the 5 per cent. duty on that is 75*l.* 19*s.*, and this is the sum now claimed by the Attorney-General. The claim therefore is, not that the income of the India Stock is to be brought into account with items on the other side which may discharge it, but that that income is specifically chargeable with 5 per cent., and the judgment which the learned judge has pronounced is a judgment which ordered that judgment be entered for the informant for 75*l.* 19*s.* with costs. That is a judgment which proceeds on the footing that this specific sum of 1519*l.* 1*s.* 3*d.* as such is a sum upon which 5 per cent. is chargeable by way of corporation duty. The case states that the defendants the Corporation had

duly rendered an account for the purpose of corporation duty of their general income chargeable with corporation duty for the yearly period January 1 to December 31, 1908, and had paid duty on such income. It is admitted that in such account the income derived from the 2½ per cent. India Stock was not included. But then, to render the matter complete upon the present point, it ought further to have been stated that on the other side the interest chargeable upon the Corporation bonds had been included. The question for the opinion of the Court is stated to be "whether corporation duty is chargeable upon the income of the 2½ per cent. India Stock hereinbefore referred to"; that is to say, whether the 75*l.* 19*s.* is a sum properly payable. What occurs to me upon the case is this, that this India Stock is stock which, standing in the names of the trustees, is hypothecated as a security to answer the debt of the Corporation. The trustees are trustees first for the stockholders as mortgagees and then for the Corporation as mortgagors. The mortgagors, the Corporation, are entitled to the equity of redemption in the fund, and upon that equity of redemption, as at present advised, I see no reason why the Corporation are not assessable for corporation duty if it is producing anything. To ascertain whether it is or is not producing anything it is necessary to see whether the income from the appropriated funds does or does not exceed the interest upon the debt which is encumbered upon them. I notice that the case states that this item is selected as one item that will govern the whole fund. It is stated that it was admitted by the parties that a decision as to income from any one of the investments would govern the whole income of the sinking fund and for simplicity and convenience this case has been limited to one particular investment, namely, India 2½ per cent. Stock. So the Court is being asked to decide whether the whole income from the mortgaged fund is chargeable with corporation duty. The contention which the Crown comes here to support was that it is chargeable upon the income from this 2½ per cent. Stock, with the result that it will be chargeable upon the income from the whole fund.

Upon the general question to which the Master of the Rolls

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has been adverting, I think, as at present advised, that the equity of redemption is property of the Corporation, and that the income of these stocks ought to be brought into account on the one side and the charge of the debt on the other. I should have preferred to have decided that question upon a case which raised and stated that point. To my mind that is not the point raised and stated on this case. If that had been raised, I do not think, as at present advised, I should have differed from the view that the Master of the Rolls has stated. Evidently in modifying the order this judgment as to 75*l.* 19*s.* must come out, and the order must be simply an expression of opinion that the income from this stock is an item which must be brought into account in arriving at the amount of duty payable.

KENNEDY L.J. I am of the same opinion. On the arguments in the Court below and the arguments addressed to us by Mr. Danckwerts to-day, there might have arisen the consideration of a really different point. I should have agreed that it would have been necessary to have the case restated. But, speaking from a more limited experience than the other members of the Court have of these cases, nevertheless it seems to be fairly clear that the real point between the parties, as appears from the judgment of Horridge J., is not whether the particular figure is a true result of a true method of charging, but whether this particular fund is one upon which, properly considered,—that is to say, taken with the proper allowances—a liability to the Crown arises to a duty of 5 per cent. If that is so, then I confess that I think it would be a waste of time to consider the matter further, as for my part I am of opinion upon the first ground of this judgment that Horridge J.'s decision was right, and therefore that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors: *The City Solicitor; Solicitor of Inland Revenue.*

H. C. R.

HENRY *v.* HAMMOND.

1913

March 3, 4.

Limitations, Statute of—Trust—Express Trust—Shipping Agent—Sale of Cargo and Payment of Claims—Balance in Hands of Agent.

In 1883 a vessel called the *International* was wrecked off the coast of Kent. The vessel and cargo were subsequently salved, and the plaintiff, who was an average adjuster carrying on business in Paris and who was acting on behalf of foreign insurers of the cargo, instructed the defendant, who was a shipping agent at Ramsgate, to sell the cargo and out of the proceeds of the sale to pay all claims and expenses in connection with the cargo. The defendant accordingly sold the cargo, and after paying all claims and expenses there remained in his hands a sum of 96*l.* This sum was not paid over to the plaintiff, nor did the plaintiff know that there was any money in the defendant's hands representing the balance of the proceeds of the sale. In the defendant's balance-sheets for the years 1884 to 1888 inclusive this sum appeared as a debt due from him, the entry being "*International*, 96*l.*," but the name of the creditor was not stated. In 1889 this sum was carried to profit and loss account, and it did not appear again in the balance-sheets. In 1912 the plaintiff, having discovered the fact that the defendant had received this sum, brought an action to recover it, to which the defendant pleaded that the claim was barred by the Statute of Limitations. The plaintiff, in answer to the plea of the statute, contended that the defendant had made himself an express trustee of this sum, and that therefore the statute did not apply:—

Held, that the transaction which the defendant was employed by the plaintiff to carry out was an ordinary commercial transaction in the way of the defendant's business as a shipping agent, that the defendant was not bound to keep the moneys coming to his hands in the course of carrying out that transaction separate from his other moneys, and that therefore he was not in the position of an express trustee of the sum of 96*l.* for the plaintiff, and the Statute of Limitations was a good defence to the claim.

Appeal from the Ramsgate County Court.

The action was brought to recover 96*l.* 11*s.* 4*d.* as money received by the defendant on behalf of the plaintiff. The defence was that the claim was barred by the Statute of Limitations.

The plaintiff was the surviving partner in the French firm of Dupuis, Jaillon & Henry, who carried on business in Paris as average adjusters. In 1883 a vessel called the *International* with a cargo of coal was wrecked off the coast of Kent. The vessel and her cargo were subsequently salved

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and brought into Ramsgate harbour. The plaintiff's firm, who were acting for the foreign insurers of the cargo (1), sent the bill of lading to the defendant, who was then carrying on business at Ramsgate as a shipping agent, with instructions to sell the cargo on their behalf and to pay all claims and expenses in connection therewith. The cargo was accordingly sold by the defendant, and after payment of salvage and other claims and expenses, including the commission due to the defendant, there remained in his hands a sum of 96*l.* 11*s.* 4*d.* due to the plaintiff's firm. This sum was not paid over to the plaintiff's firm, nor did the plaintiff's firm or the plaintiff know until 1906 or 1907 that there was any money in the defendant's hands representing the balance of the proceeds of the sale of the cargo. The sum appeared, among a large number of other items in connection with transactions with various persons, in the balance-sheets of the defendant's business for the years ending June 30, 1884 to 1888, both inclusive, as a sum owing by the defendant, the entry being "*International*, 96*l.* 11*s.* 4*d.*," but the name of the creditor was not stated. The defendant's ledger for 1889 shewed that this sum of 96*l.* 11*s.* 4*d.* was in that year carried to profit and loss account, and this particular item did not appear again in the balance-sheets. The defendant retired from business in 1899. In February, 1912, the plaintiff demanded payment of the 96*l.* 11*s.* 4*d.* from the defendant, and on June 22 of that year this action was brought.

The plaintiff, in reply to the defence of the Statute of Limitations, contended that the defendant was in the position of an express trustee of this sum for him, and that therefore the statute did not bar the claim. The county court judge held that the defendant was not an express trustee of this sum for the plaintiff, and that the claim was barred by the statute. He accordingly gave judgment for the defendant. The plaintiff appealed.

Hilbery, for the plaintiff. The defendant was entrusted by the plaintiff's firm with property for the purpose of selling it and

(1) The plaintiff's firm were treated as being themselves the insurers of the cargo.

creating a fund out of which to pay certain claims and expenses and to hold the balance for the plaintiff's firm. The defendant sold the property and there remained a balance of 96*l.* 11*s.* 4*d.* due to the plaintiff's firm, and the defendant by his entries in his balance-sheets and books treated himself as a trustee of that sum for the persons entitled to it, namely, the plaintiff's firm and now the plaintiff. He was therefore an express trustee of that money, and it is well settled that in such a case he cannot set up the defence of the Statute of Limitations. His position was not that of an ordinary agent to collect and pay over money. "Where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it": per Giffard L.J. in *Burdick* v. *Garrick*. (1) That passage was cited with approval by Lord Macnaghten in *Lyell* v. *Kennedy* (2), and by Bowen L.J. in *Soar* v. *Ashwell*. (3) In *In re Hindmarsh* (4) the solicitors who received certain money for their client did so as ordinary agents, and it was held that the relation of trustee and cestui que trust did not exist between them so as to exclude the application of the statute. That case depended upon its special facts: per Lord Hatherley in *Burdick* v. *Garrick*. (5) In the present case the defendant was a trustee of the property, namely, the coals, and he became a trustee of the sum arising from the sale of that property. He was therefore a trustee of the balance of the proceeds of the sale of that property, after paying the claims and expenses, namely, 96*l.* 11*s.* 4*d.*, for the plaintiff's firm; and further, by his entries in his balance-sheets earmarking that sum, he recognized his position as a trustee of that sum for the person entitled to it. He was in the position of a trustee holding under an express trust.

In *Lyell* v. *Kennedy* (6) Lord Selborne said: "As to the rents and profits received by the respondent, and the accumulated fund

(1) (1870) L. R. 5 Ch. 233, at p. 243.
(2) (1889) 14 App. Cas. 437, at p. 463.
(3) [1893] 2 Q. B. 390, at p. 397.
(4) (1860) 1 Dr. & Sm. 129.
(5) L. R. 5 Ch. at p. 240.
(6) 14 App. Cas. at p. 457.

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which arose from them in the banker's hands, there was a series of declarations, oral and in writing, by the respondent, sufficient, in my judgment, to establish against him, by his own admission, a fiduciary character. A man who receives the money of another on his behalf, and places it specifically to an account with a banker ear-marked and separate from his own moneys, though under his control, is in my opinion a trustee of the fund standing to the credit of that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a Court of Equity that the money was received in a fiduciary character is enough." The defendant here received the money in a fiduciary character to be dealt with by him as directed by the person entitled to it, and he was therefore an express trustee of it. *Soar* v. *Ashwell* (1), *North American Land and Timber Co.* v. *Watkins* (2), and *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co.* (3) are in point. The defendant received the cargo and its proceeds in a fiduciary capacity to deal with them in a particular way, and he can only discharge himself by shewing that he handed over the money to the person entitled to it. He was not entrusted with the property or the proceeds to deal with them as his own. As in *Lyell* v. *Kennedy* (4) be held the balance of the proceeds of the sale of the cargo for all whom it might concern. The position of the defendant was not that of an ordinary agent to receive and pay over money. He was placed in a position of confidence to negotiate with the claimants upon the cargo and to pay their just claims and also the expenses. He was paid a commission for his work, and though he was not bound to place the proceeds of the sale to a separate account he could not make a profit out of the transaction in addition to his commission. His position was different from that of a banker and customer where the banker is a mere creditor in respect of the moneys of the customers: *Foley* v. *Hill.* (5) The judgment of the county court judge was therefore wrong.

E. M. Pollock, K.C., and *Thorn Drury*, for the defendant. *Soar* v. *Ashwell* (1) shews clearly that in the case of a constructive

(1) [1893] 2 Q. B. 390.
(2) [1904] 1 Ch. 242.
(3) [1912] A. C. 555.
(4) 14 App. Cas. 437.
(5) (1848) 2 H. L. C. 28

trust the Statute of Limitations can be used as a bar to a claim. But if the fiduciary relationship under which the trustee holds the money is such that he is in the position of an express trustee the statute cannot be pleaded in answer to a claim to recover the money. Where a Court of Equity has a concurrent jurisdiction with a Court of law, the Court of Equity in affording the remedy will act by analogy to the Statute of Limitations and allow the statute to be pleaded as a bar: *Knox* v. *Gye* (1); *Friend* v. *Young*. (2) This is a common law action to recover money had and received. The fiduciary relationship which was held to exist in *Burdick* v. *Garrick* (3) depended upon the special nature of the deed under which the moneys were to be received and invested: per Hall V.-C. in *Watson* v. *Woodman* (4), cited by Stirling J. in *Friend* v. *Young*. (5) The transaction in the present case was an ordinary commercial transaction, and the Courts ought not to introduce into such transactions the equitable doctrines of trusts: per Bramwell L.J. in *New Zealand and Australian Land Co.* v. *Watson*. (6) The defendant did not stand in a fiduciary relation to the plaintiff's firm either in respect of the cargo or of the proceeds of the sale thereof. He was not bound to keep the moneys arising from the sale separate from his own moneys. It would be impossible for him to keep the moneys in each of his business transactions separate. In *Lyell* v. *Kennedy* (7) the defendant collected the rents of the property for the heir, whoever he might be, and placed the moneys so received to a separate account, and he was therefore an express trustee of those moneys. *North American Land and Timber Co.* v. *Watkins* (8) was a simple case of an express trust; and *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co.* (9) comes within the same category as *Lyell* v. *Kennedy*. (7) There is no authority to shew that a shipping agent who is employed in the ordinary course of his business to sell a cargo and to divide the proceeds in a particular way stands in

(1) (1872) L. R. 5 H. L. 656, at p. 674.
(2) [1897] 2 Ch. 421, at pp. 431, 432.
(3) L. R. 5 Ch. 233.
(4) (1875) L. R. 20 Eq. 721, at p. 731.
(5) [1897] 2 Ch. at p. 432.
(6) (1881) 7 Q. B. D. 374, at p. 382.
(7) 14 App. Cas. 437.
(8) [1904] 1 Ch. 242.
(9) [1912] A. C. 555.

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a fiduciary relation to his employer so as to be in the position of an express trustee. The judgment was therefore right.

Hilbery in reply.

CHANNELL J. This case raises an interesting point. The question is whether or not the defendant ought to be treated as being in the position of an express trustee in respect of the sum of 96*l.* 11*s.* 4*d.* claimed in this action. This sum is the ultimate balance in his hands upon an account in connection with transactions which he was employed by the plaintiff's firm to carry out in the ordinary course of his business as a shipping agent. The transactions which the defendant was employed to carry out occurred nearly thirty years ago. He is unable to shew that he has ever paid this sum over to the plaintiff's firm or to the plaintiff. But for the lapse of time the plaintiff is the proper person to recover it, and he would recover it as a debt due to him in respect of those transactions. Inasmuch, however, as the Statute of Limitations has been pleaded as a defence, he can only recover it by establishing that the defendant is in the position of an express trustee of that sum for him. It is clearly settled that a constructive trust is not sufficient, though I do not think that any question of a constructive trust arises in this case.

A considerable number of authorities have been cited, and the one which has been most often referred to in recent cases is *Burdick* v. *Garrick*. (1) In that case there is a passage in the judgment of Giffard L.J. which has been referred to with approval by many judges. Lord Macnaghten in *Lyell* v. *Kennedy* (2) said this : " The principle which governs the case may be stated concisely in the words of the late Lord Justice Giffard. In *Burdick* v. *Garrick* (3) that learned judge expressed himself as follows : ' I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it.' " The passage there cited from the

(1) L. R. 5 Ch. 233. (2) 14 App. Cas. 437, at p. 463.
(3) L. R. 5 Ch. at p. 243.

judgment of Giffard L.J. has also been approved by, among other judges, Bowen L.J. in *Soar* v. *Ashwell* (1), and I think that we may take it as, in the language of Lord Macnaghten, concisely stating the principle which governs this case. We must apply that principle to a case where the property is a sum of money. It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor. All the authorities seem to me to be consistent with that statement of the law. I agree with the observation of Bramwell L.J. in *New Zealand and Australian Land Co.* v. *Watson* (2) when he said that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions. A shipping agent carries on a well understood business, and it cannot possibly be said that he is bound to keep the money of each of the persons by whom he is employed in the course of that business separate. There is not in this case the element that there was in *Lyell* v. *Kennedy* (3) of the moneys being in fact kept separate. I am aware that, if the defendant was bound to keep the money separate, the fact that he did not do so cannot assist him; he has committed a breach of his obligation. The only use of looking at the facts to see whether in the particular case he has kept the money as a separate fund is to see whether he has recognized his obligation, the obligation itself being the essential thing. This principle seems to me to reconcile all the cases.

With reference to the case of *Reid-Newfoundland Co.* v. *Anglo-American Telegraph Co.* (4), upon which the plaintiff strongly relies, the circumstances there seem to me to be entirely different from those in the present case. In that case the money sought

(1) [1893] 2 Q. B. 390, at p. 397.
(2) 7 Q. B. D. 374, at p. 382.
(3) 14 App. Cas. 437.
(4) [1912] A. C. 555.

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to be recovered came into the possession of the defendants owing to an unauthorized and improper use of the plaintiffs' property. Where in such a case a person makes a profit out of the improper use of another person's property, he becomes a trustee of that profit for the owner of the property. That case therefore does not assist us in the present one, where there is a mere debt arising out of transactions in respect of property, namely, coals, as to which property no doubt it might possibly be said that the defendant was in a sense a trustee. For instance, he could not have bought the coals himself. He was employed to sell the coals, and to receive the money for them; he was under no obligation to keep the money so received as a separate fund, but he was entitled to mix it with his own moneys, and he was merely a debtor for the amount of the ultimate balance due from him.

I do not think that it is necessary to go through all the cases, but I desire to refer to an observation of Stirling J. in the case of *Friend* v. *Young* (1), where that learned judge, after referring to the authorities, said: "In my judgment, therefore, the existence of a fiduciary relation does not prevent the defence of the statute being set up in the present case." So in the present case the mere fact that there had been at some time the existence of a fiduciary relation does not necessarily prevent the statute being set up as a defence. In my opinion the principle applicable to the case of a banker and customer applies. The defendant in the ordinary course of his business as a shipping agent has incurred a debt, and with reference to that debt the Statute of Limitations applies. The judgment of the county court judge was right, and the appeal must be dismissed.

BRAY J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Church, Adams & Prior, for Emery & Emery, Ramsgate.*

Solicitors for defendant: *Kingsford, Dorman & Co., for J. Thorn Drury, Ramsgate.*

(1) [1897] 2 Ch. 421, at p. 432.

W. F. B.

THOMPSON *v.* H. & W. NELSON, LIMITED.

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April 7.

Ship—Seaman — Wages — Extrd Sum for Services — Sum not specified in Articles of Employment—Right to recover—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *ss.* 113, 114, 742.

By s. 113 of the Merchant Shipping Act, 1894, the master of a ship shall enter into an agreement with every seaman whom he carries to sea as part of his crew; and by s. 114 the agreement shall be signed by the master and seaman, and shall contain, inter alia, "the amount of wages which each seaman is to receive." By s. 742, "seaman" includes every person, except masters, pilots, and apprentices, employed or engaged in any capacity on board any ship; and "wages" includes emoluments.

The plaintiff entered the service of the defendants, who were the owners of a line of ocean steamers, as a steward on board one of their vessels, and he signed articles of agreement with the master in which his wages were stated to be 10*l.* a month. Part of his duties was to take charge of the bar, and he was paid, in addition to the 10*l.* a month, a commission of 5 per cent. upon the profits thereof. Subsequently it was verbally agreed between the plaintiff and the superintendent steward that he should receive 5*l.* a month instead of the 5 per cent. commission. Neither the commission of 5 per cent. nor the sum of 5*l.* a month in lieu thereof was entered in the articles. In an action to recover 10*l.*, being two months' extra payment in lieu of the commission:—

Held, that, as it was part of the plaintiff's duties as steward to take charge of the bar, the extra sum of 5*l.* a month was payable for the performance of his duties as steward, and was therefore part of his "wages" as a "seaman," and as it was not entered in the articles it was not recoverable.

Appeal from the City of London Court.

The action was brought to recover the sum of 10*l.* in the following circumstances. The defendants were the owners of a line of ocean steamers. In May, 1911, the plaintiff entered the defendants' service as chief steward on board one of their steamships. At the commencement of each voyage he entered into articles of agreement with the master under ss. 113 and 114 of the Merchant Shipping Act, 1894 (1), in which his wages were

(1) 57 & 58 Vict. c. 60, s. 113:

"(1.) The master of every ship, except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act with every

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stated to be 10*l.* a month. Part of his duties was to take charge of the bar, and he was paid a commission of 5 per cent. upon the profits thereof. After making two voyages the plaintiff had an interview with the superintendent steward, by whom he had been engaged on behalf of the defendants, when he was told that he would receive a fixed sum of 5*l.* a month instead of the 5 per cent. commission, and this the plaintiff agreed to. The plaintiff made some further voyages, and at the end of each voyage he was paid the 10*l.* a month mentioned in the articles at the Board of Trade offices, and after his accounts had been passed the defendants paid him the extra sum of 5*l.* a month. Neither the commission of 5 per cent. nor the sum of 5*l.* a month instead thereof was entered in the articles. At the conclusion of the last voyage the plaintiff was paid in respect of that voyage the 10*l.* a month wages mentioned in the articles, but he was not paid the extra sum of 5*l.* a month, and he brought this action to recover 10*l.*, being two months' extra payment of 5*l.* a month.

The action was tried with a jury, who were directed to consider whether the sum of 5*l.* a month was a bonus payable only at the option of the defendants or whether it was payable under a contract. The jury found a verdict for the plaintiff for the amount claimed, and the judge entered judgment accordingly. The defendants appealed.

J. Sankey, K.C., and *Chute*, for the defendants. The agreement to pay 5*l.* a month beyond the 10*l.* a month specified in the articles is not enforceable. It is within the definition of the word "wages" in s. 742 of the Merchant Shipping Act, 1894,

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seaman whom he carries to sea as one of his crew from any port in the United Kingdom."

Sect. 114: (1.) An agreement with the crew shall be in a form approved by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before a seaman signs the same.

"(2.) The agreement with the crew shall contain as terms thereof the following particulars:— . . . . (*e*) The amount of wages which each seaman is to receive . . . ."

By s. 742, "'seaman' includes every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship"; and "'wages' includes emoluments."

and not being mentioned in the articles as required by ss. 113 and 114 of the Act, it is not enforceable: *White* v. *Wilson* (1); *Elsworth* v. *Woolmore* (2); *Dafter* v. *Cresswell*. (3) By s. 114, sub-s. 1 (*e*), the amount of the wages must be specified in the articles, and those cases, which have always been recognized as good law, shew that the amount is not recoverable. (4)

J. P. Oliver, for the plaintiff. No doubt s. 114, sub-s. 2 (*e*), of the Merchant Shipping Act, 1894, requires the amount of the seaman's wages (and it is admitted that a steward is a "seaman") to be stated in the articles, and the cases referred to shew that unless the wages are stated in the articles they cannot be recovered. There may, however, be some emoluments which do not come within the word "wages" as defined in s. 742 of the Act. There may be one contract for employment as a "seaman," and in respect of that employment the amount of the wages must be entered in the articles, and there may be another contract, whether entered into at the same time or not, to render certain services outside his contract as a seaman, and in respect of this latter contract the remuneration need not be entered in the articles. The plaintiff in the present case, besides his ordinary duties as steward, for which he was paid the wages specified in the articles, managed the business of the bar for the defendants out of which they might make a profit, and to make that profit more secure they agreed to give the plaintiff at first a commission on the profits and afterwards a fixed sum of 5*l.* a month instead of commission. Neither the commission nor the sum of 5*l.* a month was part of the plaintiff's "wages," and therefore it need not be entered in the articles. The plaintiff accordingly is entitled to recover. [*The Elmville* (5) was referred to.]

J. Sankey, K.C., in reply.

(1) (1800) 2 Bos. & P. 116.

(2) (1803) 5 Esp. 84.

(3) (1826) 7 Dow. & Ry. 650.

(4) They also contended that the 5*l.* a month was merely a bonus payable at the option of the defendants if they considered that the plaintiff's services were satisfactory and was not payable under a contract, that there was no evidence that the superintendent steward had authority to agree to pay the extra 5*l.* a month, and that there was misdirection; but as the Court based their judgment on the point argued above, the arguments on these other points are omitted.

(5) [1904] P. 422.

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CHANNELL J. We have had some difficulty about this case. Looking at the facts which were proved at the trial and disregarding for the moment the findings of the jury, I should say that the true answer which ought to have been given in this case is that the 5 per cent. commission on the profits of the bar, which was afterwards commuted to a fixed sum of 5*l.* a month in respect of the same matter, was a bonus; in other words, that the plaintiff's services as steward were remunerated by the wages which were specified in the articles, and that an additional sum was promised to him by way of bonus if in the opinion of the defendants his services were satisfactory and produced a satisfactory profit to them. If the matter were open to us to decide and if I were deciding upon this evidence as a judge sitting without a jury I should come to that conclusion. I cannot, however, say that there was no evidence that it was a sum payable under a contract made with the superintendent steward on behalf of the defendants that the plaintiff should be entitled to that sum and was not a mere bonus. I think that there is evidence of that. There being therefore evidence both ways, the jury must be taken to have found that it was a sum payable by contract. We have therefore to consider whether this extra sum of 5*l.* a month was "wages" of a "seaman" within ss. 113 and 114 of the Merchant Shipping Act, 1894, as those words are defined in s. 742. The word "wages" includes emoluments, and "seaman" includes every person, except masters, pilots, and apprentices, employed or engaged in any capacity on board any ship, and therefore includes a steward. If a man, who comes within the definition of a seaman, is employed on board a ship to perform certain duties for which he is to receive the wages specified in the articles of agreement, and if there is a further agreement to pay him some extra remuneration for services which he is not bound to render under the agreement contained in the articles, I do not think, as at present advised, that there is anything in the Merchant Shipping Act, 1894, to prevent such a contract being enforceable. There might be some difficulty about such an agreement, if it were made at the same time as the contract of employment in the articles. An illustration may be given as to what might happen during

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the voyage. It might be agreed during the voyage that the person employed as a seaman should perform some additional services not contemplated at the time when the contract contained in the articles was entered into, and extra remuneration for those services might be agreed upon to which no objection could be made. If that agreement could be made during the voyage I do not think that it would be an objection to it that such an agreement was made before or at the time of his engagement under the articles. I am now assuming that the services so arranged for were outside his ordinary duties under the articles. I do not propose to say anything which would throw a doubt upon that proposition if it should ever arise. That, however, is not this case. The plaintiff was employed in the capacity of steward, part of his duties being, as I understand, to manage the bar. It was therefore his duty to do his best for his employers in managing the bar, and any remuneration given to him for so doing was only for the performance of his duties as steward and ought, if it was other than an optional bonus, to have been entered in the articles. I cannot say that there were any additional services to be rendered by the plaintiff beyond those which he was bound to perform for the 10*l.* a month which was entered in the articles. That being so, as the jury have found that this sum of 5*l.* a month was payable under a contract, it was a sum payable for the performance of part of his duties as steward under the articles, and therefore was part of his wages, and as such ought to have been entered in the articles. I do not see any difficulty in entering it in the articles, whether it is a fixed sum or a sum calculated at 5 per cent. on the profits of the bar. Not being in the articles, it cannot be recovered. This objection therefore is fatal, and it is not necessary to deal with the other points raised. The appeal must be allowed.

LORD COLERIDGE J. Under ss. 113 and 114 of the Merchant Shipping Act, 1894, a seaman can only recover as wages the amount specified in the articles. By s. 742 "wages" includes emoluments. Therefore to make the Act applicable the person seeking to recover must be a "seaman," and the sum demanded must be in the nature of "wages" as defined in the Act.

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Lord Coleridge J.

"Seaman" includes every person, with certain exceptions not material to this case, employed or engaged in any capacity on board any ship. First of all, is a man in control of the bar a "seaman" within the meaning of the Act? It seems to me that he is a seaman just as the ship's cook or any other person engaged in a similar character on board the ship is a seaman. Next, what does he claim to recover? He claims to recover, not the fixed wages of 10*l.* a month specified in the articles, which he has already received, but something extra which does not appear in the articles and which is a sum payable in lieu of a commission of 5 per cent. upon the profits of the bar. The Act is, in my opinion, applicable to all forms of emoluments which are directly payable in respect of the employment of the person as a seaman, and the question is whether this particular sum claimed comes within that description. I think that the jury must be taken to have found that the sum in question was a sum payable by contract. It was payable by contract in respect of the performance of certain duties, and those were duties which he under his engagement as a seaman was bound to perform. I do not myself see that any distinction can be drawn between the sum in dispute in this action, which was a sum payable in lieu of a commission of 5 per cent. upon the profits of the bar, and the sum of 10*l.* payable by way of wages and specified in the articles. They seem both to be in the same legal category, and both to come within the provisions of the Act requiring them to be specified in the articles. In these circumstances it is unnecessary to say anything about the other points raised.

Appeal allowed.

Solicitor for plaintiff: *E. H. Rideout.*
Solicitor for defendants: *F. A. S. Stern.*

W. F. B.

LONDON COUNTY COUNCIL, Appellants *v.* WELFORD'S SURREY DAIRIES COMPANY, LIMITED, Respondents.

1913
April 10.

Shop — Weekly Half-holiday — Exempted Trade — Butter — Run Honey— Confectionery—Shops Act, 1912 (2 & 3 *Geo.* 5, *c.* 3), *s.* 4, *sub-ss.* 1, 6; *Sched. II.*

By s. 4, sub-s. 1, of the Shops Act, 1912, every shop shall, save as otherwise provided by the Act, be closed for the serving of customers not later than 1 o'clock in the afternoon on one weekday in every week.

By sub-s. 6 the section is not to apply to any shop in which the only trade or business carried on is trade or business of any of the classes mentioned in the Second Schedule to the Act, including "the sale of meat, fish, milk, cream, bread, confectionery, fruit, vegetables, flowers, and other articles of a perishable nature."

By sub-s. 7 in case of contravention of the section the occupier of the shop is guilty of an offence and liable to a fine.

The respondents carried on the business of dairymen and kept a shop in which they sold milk, cream, and butter, and in addition honey in pots. On the day fixed for the weekly half-holiday the respondents' shop was open after 1 o'clock and the manager sold to a certain applicant some butter and a pot of run honey.

On an information charging the respondents with an offence under s. 4 of the Act a Court of summary jurisdiction held that butter was an article of a perishable nature and that run honey was confectionery within the meaning of the Second Schedule, and that no offence had been committed.

On a case stated:—

Held per curiam (Ridley, Pickford, and Avory JJ.), that butter was an article of a perishable nature within the meaning of the Second Schedule; but

Held by Pickford and Avory JJ. (Ridley J. dissenting), that, there being no evidence upon which run honey could be held to be confectionery within the meaning of the schedule, the sale of run honey was not a trade or business exempted from the operation of s. 4, and that an offence had been committed.

Case stated by a metropolitan magistrate.

An information was laid by William Ernest Chamberlain on behalf of the appellants charging the respondents for that during the week ending August 17, 1912, a shop known as No. 89, Bedford Hill, in the borough of Wandsworth, was not closed for the serving of customers not later than 1 o'clock in the afternoon on one weekday in the aforesaid week, whereby the

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respondents, the occupiers of the shop, became guilty of an offence against s. 4 of the Shops Act, 1912. (1)

(1) Shops Act, 1912 (2 & 3 Geo. 5, c. 3), s. 4: "(1.) Every shop shall, save as otherwise provided by this Act, be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week."

By sub-s. 2 the local authority may in certain events by order fix the day on which a shop is to be closed (in the Act referred to as the weekly half-holiday).

Sub-s. 3: "Unless and until such an order is made affecting a shop, the weekly half-holiday as respects the shop shall be such day as the occupier may specify in a notice affixed in the shop . . . ."

Sub-s. 6: "This section shall not apply to any shop in which the only trade or business carried on is trade or business of any of the classes mentioned in the Second Schedule to this Act . . . ."

The Second Schedule includes, among other trades and businesses exempted from the provisions as to weekly half-holiday, "The sale of meat, fish, milk, cream, bread, confectionery, fruit, vegetables, flowers, and other articles of a perishable nature."

Sect. 10, sub-s. 1, of the Act and s. 5 of the Regulations made thereunder by the Secretary of State for the Home Department are not strictly material to this report, but as they are mentioned in the special case they are appended hereto.

Sect. 10, sub-s. 1: "Where several trades or businesses are carried on in the same shop, and any of those trades or businesses is of such a nature that, if it were the only trade or business carried on in the shop, the shop would be exempt from the obligation to be closed on the weekly half-holiday, the exemption shall apply to the shop so far as the carrying on of that trade or business is concerned, subject, however, to such conditions as may be prescribed."

Sect. 5 of the Regulations made by the Secretary of State for the Home Department under the above enactment: "Where any trade or business exempted from the provisions of the Act as to closing on the weekly half-holiday is carried on in the same shop with any trade or business not so exempted, the shop shall only be kept open for the purpose of the exempted trade or business on the day fixed for the weekly half-holiday in respect of the trade or business not exempted, on the following conditions:—

"(*a*) After the hour of closing on the day of the weekly half-holiday, whether fixed by the occupier or by an order made by the local authority under the Act, there shall be exhibited in some conspicuous places on the exterior and in the interior of the shop notices in letters of the size of not less than two inches in accordance with the Form marked IV. in the Schedule to these Regulations;

"(*b*) So far as reasonably practicable no goods in connexion with the trade or business not exempted shall be exhibited either inside or outside the shop."

Form IV. in the Schedule to the Regulations is in the following words:—"Shops Act, 1912, s. 10 (1.). This shop is closed for to-day except for the * trade or business of

* In shops where a wholesale and retail business are carried on together, and the shop is kept open on the half-holiday for the wholesale business, the word 'wholesale' should be inserted in the notice before 'trade.'"

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The magistrate dismissed the summons, but at the request of the appellants stated a case in which the following facts appeared:—

(*a*) On Wednesday, August 14, 1912, William Ernest Chamberlain, an inspector in the employ of the appellants, kept the respondents' shop, 89, Bedford Hill, Wandsworth, under observation and caused purchases to be made therein by John Hannagan, who between 3 o'clock and 3.5 P.M. entered the respondents' shop and purchased a quarter of a pound of butter and a pot of run honey. The door of the shop was open but the blinds were down. The purchaser, John Hannagan, was served by the manager of the shop. The business of the shop is that of a dairyman selling milk, cream, and butter, and in addition honey in pots.

(*b*) It was admitted that Wednesday was the day of the week on which shopkeepers in the locality kept their shops closed for the weekly half-holiday in pursuance of the Shops Act, 1912, and that no order had been made by the local authority under s. 4, sub-s. 2, of that Act. It was also admitted that there was no notice displayed at the shop in accordance with s. 10, sub-s. 1, of the Act and s. 5 of the Regulations dated April 1, 1912, made by the Secretary of State for the Home Department under the Act.

The respondents referred to s. 4, sub-s. 6, of the Shops Act, 1912, and to Sched. II. of the said Act, and contended that honey came within the term "confectionery"; that butter was an article of a perishable nature within the meaning of the Second Schedule; that their business therefore fell within the classes of trades or businesses referred to in the schedule as totally exempted from the provision of s. 4; that for the same reason it became unnecessary for them to exhibit the notice prescribed by s. 10, sub-s. 1, and s. 5 of the Regulations above referred to; and consequently that the offence charged had not been committed by them.

The appellants contended that honey did not come within the term "confectionery." They admitted that confectionery included sweetmeats and artificially made sweets, but insisted that it did not include natural products such as honey. They

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further contended that the words "articles of a perishable nature" in the Second Schedule meant articles which were perishable between the hours of closing and opening the next morning, or rapidly perishable, so that by reason of the closing period they would become unsaleable, and did not include butter; and that therefore the respondents could not claim the exemption provided by s. 4, sub-s. 6, and the Second Schedule and s. 10 of the Act. They contended further that the shop was kept open for the serving of customers by reason of the omission to display the notice prescribed by s. 10, sub-s. 1, more than one business being carried on therein within the meaning of that sub-section, namely, the trades of selling (*a*) perishable goods and (*b*) goods which were not perishable, or exempted.

The magistrate decided that the respondents' contention that the whole of their business was exempt in accordance with the provisions of the Act was right. He therefore dismissed the information.

The question for the opinion of the Court was whether the magistrate was right in law in dismissing the information.

Bodkin, for the appellants. The magistrate ought to have convicted in this case. Run honey is not confectionery: The Century Dictionary, sub voc. "Confectionery."

[PICKFORD J. Johnson's Dictionary, sub voc. "Sucket n. s. [from suck] A sweet meat," gives this quotation:—

> "Nature's confectioner, the bee,
> Whose suckets are moist alchimy;
> The still of his refining mold,
> Minting the garden into gold.—CLEAVELAND."

(Quære John Cleveland, or Cleiveland, 1613–1653).]

In the New (or Oxford) English Dictionary "confection" is said to mean the "making or preparation by mixture of ingredients; mixing, compounding; composition, preparation, making up, manufacture. Sometimes esp. the making of preserves or confectionery." "Confectioner" is defined as "a maker of confections"; and "confectionery" is said to mean "things made or sold by a confectioner." The word implies an article which has gone through some artificial change or modification.

A natural product such as honey cannot, except by poetic licence, be described as confectionery. The same applies to run honey which is merely natural honey separated from the cells: see Chambers' Encyclopædia, article "Honey."

Secondly, butter is not an article of a perishable nature within the meaning of the words in the schedule. Perishable means that which will substantially deteriorate during the hours of closing. The schedule comprises necessaries and articles which are perishable in this sense.

F. O. Robinson, for the respondents. The magistrate was right on both points. Of the articles in the schedule some are rapidly perishable while others are not so liable to be affected. Butter is as perishable as some fruit or vegetables, which are included in the list.

Then as to the honey, run honey is not honey in its natural state. The process of extracting honey from the comb and clarifying or refining it is an elaborate one: see Encyclopædia Britannica, article "Honey." It serves the same purpose as jam and other kinds of confectionery. Not being a purely natural product it falls within the definitions which have been given of confectionery. The use of the word confectioner in English literature is further shewn by the passage "Nature's prime confectioner, the bee," which occurs in a poem by Edward Benlowes published in 1652 and entitled "Theophila or Love's Sacrifice, a divine poem written by E. B. Esq., several parts thereof set to fit aires": Dict. Nat. Biog., vol. 4, p. 226; New English Dictionary, sub voc. "Confectioner."

Thirdly, even if run honey is not confectionery, the business carried on by the respondents is the business of dairymen. The effect of the schedule is to exclude that business from the operation of the Act. The sale of honey in pots is merely ancillary or accessory to the business of a dairyman, and therefore that is within the exemption.

Bodkin in reply.

RIDLEY J. This case raises a question not exclusively of law upon which there may be more than one opinion. The question is whether the sale of butter and the sale of run honey are

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within the trades and businesses included in the Second Schedule to the Shops Act, 1912, and therefore exempted from the operation of s. 4 of the Act. The respondents raised, but in my view failed to substantiate, another point, namely, that the magistrate found that the business carried on by them was that of a dairyman selling milk, cream, and butter, and in addition honey in pots; that the Second Schedule exempts the business of a dairyman; that the sale of honey is part of or merely accessory to the business of a dairyman; and that therefore s. 10 of the Act, dealing with the case where several trades or businesses are carried on in the same shop, does not apply. I cannot take that view. Where a man deals in honey as well as in milk and cream, the Act regards him as carrying on more than one trade or business. To escape the operation of s. 10 a man must be within s. 4, sub-s. 6, and shew that the only trade or business he carries on is one of those named in the Second Schedule. In my opinion he cannot do that if besides dealing in milk and cream he is selling honey in pots.

Then the question is whether butter and honey are within the words "meat, fish, milk, cream, bread, confectionery, fruit vegetables, flowers, and other articles of a perishable nature" in the Second Schedule to the Act. It is not easy to determine what goods are intended to be included in this list; some of the articles enumerated are not perishable; others are; and therefore the list affords but little guidance to one who would ascertain whether a particular article not actually enumerated is within the exemption. But when the magistrate held that the sale of butter was within the schedule I think he was right. It was not intended to include only goods which would perish if not disposed of within twenty-four hours. What applies to the sale of cream would seem to apply equally to the sale of butter.

Then as to honey in pots. The respondents contend that this is confectionery and therefore included in the schedule, and in my opinion it is. Otherwise I cannot see what meaning is to be given to the word. The appellants contend that the word implies some process such as cooking or passing through a sieve, or the application of some handicraft whereby a product of nature has been subjected to some change. But this honey has been

subjected to a change. It has not indeed been submitted to such a process as cooking, but still it has ceased to be a mere product of nature. As a natural product it was contained in cells; by an artificial process it has been extracted from the cells. Having been submitted to this process I think it has become confectionery, and that the magistrate was right on both points.

PICKFORD J. I regret to find myself in disagreement with Ridley J. on one point.

The case states that the business of the respondents was that of a dairyman selling milk, cream, and butter, and in addition honey in pots. In my opinion the statement that the respondents were carrying on the business of dairymen is immaterial. Sect. 4, sub-s. 6, of the Act says that the section shall not apply to any shop in which the only trade or business carried on is trade or business of any of the classes mentioned in the Second Schedule. The material classes of business mentioned in that schedule are "the sale of meat, fish, milk, cream, bread, confectionery, fruit, vegetables, flowers, and other articles of a perishable nature." It is to be observed that the business of a dairyman is not mentioned. The businesses exempted are those which consist of selling the specified articles and other articles of a perishable nature. If the trade or business in which a man is engaged is that of selling milk and other articles, then, in order to claim exemption from the provisions of the Act on the ground that the only trade or business carried on is trade or business of a class mentioned in the schedule, he must shew that all the other articles which he sells are included in the schedule. Therefore I agree with my brother Ridley that the argument of the respondents that they were only carrying on the business of dairymen, and that part of that business is the sale of honey, cannot prevail.

Then come the questions whether butter is an article of a perishable nature, and whether honey is confectionery within the meaning of the schedule. On the first of these questions I am not prepared to differ. As to the second question, the honey was honey in pots. We were referred to several books explaining how honey is extracted from the honey comb. But no explanation or description of the process is stated in the case. The argument

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before the magistrate was that honey qua honey was confectionery. That is clear from the statement that "the respondents referred to s. 4, sub-s. 6, of the Shops Act, 1912, and to Sched. II. of the said Act, and contended that honey came within the term 'confectionery.'" There is nothing to shew that any process was applied to this run honey beyond the mere separation from the comb. Honey separates itself from the comb by its own weight because the comb does not suffice to contain it. After separation it is no less honey than it was while still in the comb, even if machinery be used in rotating the comb to promote separation. In my opinion honey sold in this state does not come within the meaning of the word "confectionery" in the schedule, which requires some process in the making of it. In some future case it may be possible to shew that some process is applied to run honey which may bring it within the meaning of the word. In the present case there is no finding beyond the simple fact that it is separated from the comb. After this was done the substance was just as much honey as it was before the separation. Differing as I do from my brother Ridley I cannot feel much confidence in my view, but my opinion is that as regards the honey the respondents do not bring themselves within the exemption, and that the magistrate was wrong on that point.

Avory J. I agree with the judgment of my brother Pickford. The respondents contend that their shop was one in which the only trade or business carried on was trade or business of a class mentioned in the Second Schedule to the Act. They suggested that the only business carried on was "the sale of . . . . milk, cream, bread, confectionery . . . . and other articles of a perishable nature." I should have thought myself that "other articles of a perishable nature," in view of the purposes of the statute, meant articles rapidly perishable; but it is impossible so to limit the meaning of the words when the same class contains vegetables, which would include, for example, potatoes. If potatoes are of a perishable nature I am unable to differ from the magistrate, who held that butter falls within the same category. On this part of the case I agree with my brother Ridley.

Besides butter, however, the respondents were selling run

honey in pots. There being no finding to the contrary, we must take it that run honey means honey run from the comb without admixture of any other substance and without being submitted to any process other than that of extracting it from the comb. In my opinion honey in that state is not confectionery. That word in its natural meaning indicates an article prepared from different ingredients by means of some process. I am unable to agree that honey, which as deposited in the comb no one could call confectionery, becomes confectionery by being extracted from the comb. This case must therefore be remitted to the magistrate with a direction to convict upon this point.

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AVORY J.

Appeal allowed.

Solicitor for appellants: *Edward Tanner.*
Solicitors for respondents: *Aird, Hood & Co.*

W. H. G.

[IN THE COURT OF APPEAL.]

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March 11.

In re BONNETT, APPLICANT; AND FOWLER AND OTHERS, RESPONDENTS.

Landlord and Tenant—Agricultural Holdings—Market Garden—Notice to Quit—"Good and sufficient cause"—"Reasons inconsistent with good estate management"—Demand of increased Rent—Power of Court of Appeal to draw Inferences of Fact—Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *s.* 11 (*a*), (*b*).

A notice to quit given by a landlord of an agricultural holding to his tenant with a view of obtaining an increased rent from a new tenant is a termination of the holding "with good and sufficient cause" and is not a termination of the holding "for reasons inconsistent with good estate management" within the meaning of s. 11 (*a*) of the Agricultural Holdings Act, 1908.

Observations of Lord Dunedin in *Brown* v. *Mitchell*, 1910 S. C. 369; 47 Sc. L. R. 216, approved.

Quære, whether the Court of Appeal has power to draw inferences of fact in an appeal from the decision of a county court judge upon a case stated by an arbitrator under the Agricultural Holdings Act, 1908.

APPEAL from a decision of the judge of the county court of Essex, holden at Romford, upon a special case stated under the

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Agricultural Holdings Act, 1908. The case was in the following terms.

"The following facts were admitted or proved.

"1. By an indenture of lease dated April 26, 1898, made between the Rev. C. G. H. Tardy (thereinafter called the lessor) of the one part and Dick Bonnett (thereinafter called the tenant) of the other part, all that messuage, tenement, or dwelling house with the barn, stables, outbuildings, yards, gardens, part market garden, and the several pieces of arable meadow and pasture land thereunto belonging containing by estimation sixty-two acres and thirty-seven perches or thereabouts, known as Grove Farm, Hornchurch, Essex, then in the occupation of the lessee, were demised by the lessor unto the lessee for the term of fourteen years from September 29, 1895, at the annual rent of 143*l.* (i.e. about 2*l.* 6*s.* per acre) payable half-yearly on March 25, and September 29, in each year. [A copy of the lease was attached to and formed part of the case.]

"2. The landlord and the tenant Bonnett admit that the holding was let to the tenant Bonnett to be used and treated as a market garden. The whole of the holding had been cultivated as a market garden before it was let to the said Bonnett, and was when the tenant Bonnett entered into possession on September 29, 1895, though clean, not in a high state of cultivation.

"3. During the term created by the said lease the lessor C. G. H. Tardy died and the reversion became vested in the present landlords as trustees for the said Mrs. Gertrude Mary Fowler and her child. The said Mrs. Gertrude Mary Fowler was formerly the wife and then the widow of the lessor the said C. G. H. Tardy.

"4. The term created by the lease expired on September 29, 1909. Early in September, 1909, the said Mrs. Gertrude Mary Fowler on behalf of the landlords saw the tenant Bonnett and informed the tenant Bonnett on behalf of the landlords that he could continue in the farm if he would pay 3*l.* an acre, i.e. 186*l.*, which the said Bonnett refused to do. On more than one occasion the tenant stated to the landlords he would not stand in the landlords' way if they could get a higher rent. On September 12, 1909, Mrs. Gertrude Mary Fowler on behalf

of the landlords wrote to the tenant Bonnett saying 'should you wish to remain after September 29, I must have an advanced rent of 30*l.*, the arrangement being yearly and the terms of the lease the same.' The tenant Bonnett refused to pay such increased rent, but offered 155*l.* per annum. Negotiations ensued, and ultimately it was agreed in correspondence that the tenant Bonnett should continue as tenant of the holding from September 29, 1909, at the increased rent of 155*l.* per annum (i.e. 2*l.* 10*s.* per acre) as a yearly tenant upon the terms of the lease.

"5. Shortly before and also after the commencement of the new tenancy at Michaelmas, 1909, to wit, in or about September, 1909, and December, 1909, the landlords by their agent asked the said Bonnett to pay 3*l.* per acre for the holding, making the sum 186*l.* When so asking him in December, 1909, they also then informed the tenant Bonnett that if he was not prepared to pay that rent he would receive notice to quit. In March, 1910, the landlords by their agent again asked the tenant Bonnett to pay the increased rent of 186*l.*, and the tenant Bonnett replied, 'The question of rent we have discussed and settled six months ago. Why will you open that question?' The tenant Bonnett refused to pay the increased rent, and on September 24, 1910, he received notice to quit at Michaelmas, 1911. The tenant Bonnett has duly quitted the holding in pursuance of the said notice. The holding has been re-let to a tenant named Poole from Michaelmas, 1911, at the annual rent of 186*l.*, i.e. 3*l.* per acre.

"6. On entering into the agreement of tenancy in September, 1909, the tenant Bonnett did so as a yearly tenant upon the terms of the lease. I find as a fact that the tenant Bonnett believed that his having agreed in September, 1909, to pay 155*l.* per annum instead of 143*l.* had settled the question of rent and believed that he, Bonnett, would not be disturbed in the immediate future in his tenancy upon the ground that a higher rent was expected.

"7. I find the following facts: (*a*) That from Michaelmas, 1895, to Michaelmas, 1911, the tenant Bonnett was a good and satisfactory tenant. (*b*) That the tenant Bonnett has during his

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tenancy of fourteen years and two years improved the heart of the land comprised in his holding by continuous high cultivation. (*c*) That the tenant Bonnett during his tenancies has effected the following improvements to the holding at his own cost, viz., making of roadway in eleven acre field; making of roadway leading from yard to big field; laying floor to centre of barn; converting open shed into stable; putting cement floor to chaff house and trap house; paving loose boxes; putting cement floor to cowshed; new drain to cowshed; providing and fixing mangers to cowshed; new windows and making floor to office; fitting in a primitive manner bathroom in house and laying on hot and cold water supply to same; laying water company's supply to house and farm yard; fitting up w.c. in house in a primitive manner. (*d*) That in regard to the matters enumerated under head (*b*) the tenant Bonnett has not received and will not receive full compensation on his tenant right valuation, and that in regard to the matters enumerated under head (*c*) the tenant Bonnett has not received and will not directly or indirectly receive any equivalent from the landlords. (*e*) That the matters enumerated under heads (*b*) and (*c*) have increased the letting value of the holding. (*f*) That the notice to quit at Michaelmas, 1911, was given for the sole reason that the tenant Bonnett refused to pay the further increased rent of 10*s*. per acre demanded of him. That such further increased rent was not proved to have been demanded by the landlords by reason of an increased value of the holding resulting from the matters enumerated under heads (*b*) and (*c*). (*g*) That the holding has been relet by the landlords to a new tenant at the rate of 3*l*. per acre, being an increased rent of 14*s*. and 10*s*. an acre upon the rents paid by the tenant Bonnett under his tenancies of fourteen and two years respectively.

"8. The tenant Bonnett has given all notices necessary to entitle him to claim compensation under s. 11 of the Agricultural Holdings Act, 1908, if the Court shall be of opinion that he is otherwise entitled to do so.

"9. The questions for the opinion of the Court upon the above facts are: (1.) Have the landlords terminated the tenancy by notice to quit without good and sufficient cause? (2.) Have the

landlords terminated the tenancy for reasons inconsistent with good estate management? (3.) Is the tenant Bonnett entitled to claim compensation under s. 11 on the ground that his claim comes within s. 11 (*a*)? (4.) Is the tenant Bonnett entitled to claim compensation on the ground that his claim comes within s. 11 (*b*)?" (1)

The following judgment was delivered by the learned county court judge:—

The answers to questions 1 and 2 depend upon the proper construction of s. 11 (*a*) of the Agricultural Holdings Act, 1908. It was argued on behalf of the tenant that the words "good estate management" referred to the estate of the tenant, and therefore to constitute "good and sufficient cause" there must be some agricultural failure or wrongful act in the management of the demised property by the tenant. I do not assent to this argument. I do not think it is necessary to consider whether the words "without good or sufficient cause" are controlled or cut down by the words "for reasons inconsistent with good estate management," or whether each of the grounds must be treated separately. I respectfully concur with the judgment of the Lord President of the Court of Session in *Brown* v. *Mitchell* (2), that a landlord is only liable to pay

(1) The Agricultural Holdings Act, 1908 (8 Edw. 7, c. 28), s. 11: "Where—(*a*) the landlord of a holding, without good and sufficient cause, and for reasons inconsistent with good estate management, terminates the tenancy by notice to quit, or, having been requested in writing, at least one year before the expiration of a tenancy, to grant a renewal thereof, refuses to do so: or (*b*) it has been proved that an increase of rent is demanded from the tenant of a holding, and that such increase was demanded by reason of an increase in the value of the holding due to improvements which have been executed by or at the cost of the tenant, and for which he has not, either directly or indirectly, received an equivalent from the landlord, and such demand results in the tenant quitting the holding—the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connexion with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock, on or used in connexion with the holding."

(2) 1910 S. C. 369; 47 Sc. L. R. 216.

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disturbance compensation where the notice to quit is given for no good reason, but capriciously. Upon the facts stated the landlords gave the tenant notice to quit because they could and did obtain a larger rental than the tenant was willing to give. There is not any statement in the case that the termination of the tenancy for the purpose of securing the higher rent was inconsistent with good estate management. Prima facie it would not be. I am of opinion that questions 1 and 2 must both be answered in the negative. I answer the third question in the negative.

What ought to be the answer to the fourth question is not altogether free from difficulty. Upon the facts as stated and the true inference to be drawn from them, ought I to say that it has been proved that the increased rent was demanded by reason of an increase in the value of the holding due to improvements which have been executed by and at the cost of the tenant so as to entitle the tenant to disturbance compensation within the meaning of s. 11 (*b*)? In the circumstances it is not necessary to consider the concluding words of that sub-section. It is argued on behalf of the tenant that the burden of proof is on the landlords to shew that the increased rent was not demanded by reason of an increase in the value of the holding due to the tenant's improvements and that the case, as stated, shews that the landlords have not satisfied this burden. It is to be observed that the arbitrator has found in the very words of the section that "such further increased rent was not proved to have been demanded by the landlords by reason of an increased value of the holding resulting from the matters enumerated under heads (*b*) or (*c*)." It is found that "the tenant, Bonnett, was a good and satisfactory tenant" and "during his tenancy of fourteen years and two years improved the heart of the land comprised in his holding by continuous high cultivation." I must assume that the arbitrator has heard the parties and that all the circumstances that could be furnished in relation to this point were before him. There is no fact stated from which I can draw an inference adverse to his findings. The Legislature has not in terms imposed the obligation on the part of the landlord to prove affirmatively that the increased

rent was not demanded by reason of the increased value due to improvements by the tenant. Whether the proof required to be given has been furnished is a question for the arbitrator, and he, having considered all the circumstances, has come to the conclusion that it has not been proved that the increased rent was demanded by virtue of an increased value of the holding resulting from the tenant's improvements. I think it is for the arbitrator to find whether the proof required by the statute existed, and on this point he has given a definite finding. I have no materials from which I can draw the inference that he was wrong. The result is that all the questions are answered in the negative.

The applicant appealed.

Hohler, K.C., and *W. Mackenzie*, for the appellant. The provisions of s. 11 of the Agricultural Holdings Act, 1908, are intended to give the tenant compensation for unreasonable disturbance. In this case on the findings the tenant has satisfied the conditions of s. 11 (*a*), that is, he has shewn that the landlords without good and sufficient cause, and for reasons inconsistent with good estate management, have terminated his tenancy by notice to quit. The clear intention of the section is that, although it does not give fixity of tenure, yet if the landlord gets rid of the tenant the latter is entitled to compensation for stock and improvements. The tenant has carried out various improvements which improved the value of the holding.

[FARWELL L.J. There is no bad estate management in a landlord saying "You have had the land for a long time at a very low rent, and now I want a bit more."]

The real point is whether on the facts it has not been shewn that the tenancy was terminated without good and sufficient cause and for reasons inconsistent with good estate management. It had been agreed a few months before that the tenancy should go on, and it is inconsistent with good estate management for the landlord, immediately after the tenant comes in, to raise the question of rent and to say that he wants more.

[FARWELL L.J. What do you mean by good estate management?]

Acting fairly as between landlord and tenant.

If a finding in the case of a demand for increased rent is to

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be considered good estate management and good and sufficient cause for a notice to quit, then the purpose and intent of the section are defeated.

There is no finding that the rent which the tenant had been paying was unreasonably low in regard to what the property might reasonably be expected to fetch in the market. A landlord is not entitled capriciously to put an end to a tenant's tenancy: *Brown* v. *Mitchell*. (1) When the tenant has proved a tenancy and that he has been a good tenant, and that the tenancy has been terminated by the landlord, he has done all that he is required to do by the section, and the onus is then on the landlord to shew why the tenancy was determined by him.

As to s. 11 (*b*), the finding in the case is that the matters enumerated have increased the value of the tenancy.

[KENNEDY L.J. There is no finding that the increased rent was demanded because of the tenant's improvements, and you want such a finding.]

Order XL., r. 3 (1.), of the County Court (Agricultural Holdings) Rules, 1909, gives power to the county court judge to draw from the facts and documents stated in the case any inferences, whether of fact or law, which might have been drawn therefrom if proved at the hearing of the arbitration, and this Court should draw the inference which ought to have been drawn by the county court judge that the increased rent was demanded because of the tenant's improvements.

Romer, K.C. (*A. J. Spencer* with him), for the respondents, was directed to confine himself to the question arising upon s. 11 (*b*). The finding of the arbitrator that it was not proved that the increase of rent demanded was due to the tenant's improvements is sufficient to justify the judgment of the learned county court judge. It may well have been that increased rent was necessitated by the fact that the holding had always been let at too low a rent.

[He was stopped by the Court.]

March 11. VAUGHAN WILLIAMS L.J. I agree entirely with the judgment of the learned county court judge. I am of opinion that the facts that the rent is too low and that the

(1) 1910 S. C. 369; 47 Sc L. R. 216.

tenant refuses to pay any more constitute, as was pointed out by Lord Dunedin in *Brown* v. *Mitchell* (1), a good and sufficient cause consistent with good estate management to exclude the operation of s. 11 of the Agricultural Holdings Act, 1908. I also think that the onus is on the tenant to shew that the landlord had not good and sufficient cause for reasons consistent with good estate management to terminate the tenancy, but that this onus is liable to shift. As regards clause (*b*) of s. 11, it may mean that the landlord had in his mind the improvements executed at the cost of the tenant as the reason for demanding an increased rent or that the demand for an increased rent is something apart from what may be in the mind of the landlord, e.g., that it may have arisen from the fact that the holding will command a higher rent in the market; but, whichever may be the meaning, it is covered by the finding in the case that "such further increased rent was not proved to have been demanded by the landlords by reason of an increased value of the holding resulting from the matters enumerated under heads (*b*) and (*c*)." I think that this appeal must be dismissed; the findings of the arbitrator make it impossible for the appeal to succeed even if the Court has a right, which I greatly doubt, to draw inferences of fact upon the hearing.

FARWELL L.J. I am of the same opinion. As the provisions of the English and Scotch Agricultural Holdings Acts of 1908 relative to the question before us are identical, and as there is no appeal to the House of Lords from our decision, it is desirable that the decisions of the Court of Session and of this Court should, if possible, be in agreement. I agree with Lord Dunedin that the intention of the section in the Scotch Act corresponding to s. 11 of the English Act was "to give compensation for what may be characterised as capricious disturbance on the part of the landlord in capriciously putting an end to the lease." On that head the case is almost too clear for argument. As Lord Dunedin says, if the rent is too low and the tenant will not give more, that is a perfectly good reason, consistent with good estate management, for the determination of the tenancy.

(1) 1910 S. C. 369, 385; 47 Sc. L. R. 216.

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The next point is in respect of a claim for compensation arising under sub-s. (*b*) of s. 11 of the Act, and as to this it is necessary to state a few facts. A lease for fourteen years had been granted to the appellant, at the expiration of which term he continued for two years more as a yearly tenant upon the terms of the lease. During those two periods certain works or improvements were done or made by the tenant which are set out in paragraph 7 of the case. It does not appear whether these works were done during the fourteen years period or were mostly done during the subsequent two years, for no dates are given; but they would seem to have been spread over the whole of the period covered by the two tenancies. Now we come to s. 11, sub-s. (*b*), which provides that "where it has been proved that an increase of rent is demanded from the tenant of a holding, and that such increase was demanded by reason of an increase in the value of the holding due to improvements which have been executed by or at the cost of the tenant, and for which he has not, either directly or indirectly, received an equivalent from the landlord, and such demand results in the tenant quitting the holding, the tenant upon quitting the holding shall, in addition to the compensation (if any) to which he may be entitled in respect of improvements, and notwithstanding any agreement to the contrary, be entitled to compensation for the loss or expense directly attributable to his quitting the holding which the tenant may unavoidably incur upon or in connexion with the sale or removal of his household goods, or his implements of husbandry, produce, or farm stock, on or used in connexion with the holding." Under sub-s. (*b*) it is for the tenant to prove that increased rent was demanded because of the increase in value of the holding due to improvements executed by him, and this is a fact which can be as well proved by the tenant as by the landlord. The finding of the arbitrator is, however, that the further increased rent was not proved to have been demanded by the landlords by reason of an increased value of the holding resulting from the tenant's improvements. That seems conclusive and to deprive the tenant of any claim for compensation under this sub-section.

It is further said that, as the arbitrator has found that "the

matters enumerated under heads (*b*) and (*c*) have increased the letting value of the holding," we ought to draw the inference that that was the reason for demanding an increased rent; but even if we had power to draw such an inference, it is impossible for us to draw the inference asked because of the negative finding of the arbitrator. There seems to have been an increase in the value of the holding quite independent of any improvements executed by the tenant. It is therefore idle to ask us to negative the arbitrator's finding and to find something else which we have no materials to enable us to find. I entirely agree with the judgment of the county court judge.

KENNEDY L.J. I am of the same opinion. Dealing with s. 11, sub-s. (*a*), it is clear that it is meant to apply only where it is made good that the landlord has terminated the tenancy by notice to quit, or that, having been requested in writing, at least one year before the expiration of the tenancy, to grant a renewal thereof, he refused to do so, and that he so acted without good and and sufficient cause, and for reasons inconsistent with good estate management. I do not propose to go further than is required by the particular facts of the present case. But this seems clear, that it was certainly not proved by the tenant that there was not a good and reasonable cause for the determination of the tenancy, and that there is no proof that what the landlords did was inconsistent with good estate management. Prima facie the reverse was the case; it was done because the landlords could get a tenant who was willing to give a materially increased rent, and who was just as respectable and solvent as the appellant.

The question arising under s. 11, sub-s. (*b*), is answered by the finding in the case that increased rent was not proved to have been demanded by the landlords by reason of an increased value of the holding resulting from the matters enumerated under heads (*b*) and (*c*). The arbitrator had found previously that, in regard to the matters enumerated under heads (*b*) and (*c*), the tenant had not received and would not receive full compensation on his tenant right valuation; that in regard to the same matters he had not received and would not directly or indirectly receive any equivalent from the landlords; and that the same

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matters had increased the letting value of the holding. The arbitrator has therefore found that the demand for an increased rent was not proved to have been made by the landlords by reason of an increased value of the holding resulting from cultivation and improvements by the tenant at his own cost. It is clear, therefore, without discussing the question of the burden of proof, that the arbitrator has found that that which is made a condition precedent by sub-s. (*b*) and which is called in the marginal note to the section "unreasonable disturbance" has not been proved in this case. I cannot see how, in the face of such a finding by the arbitrator, any one can say that the learned county court judge was wrong in saying that no claim for compensation under s. 11, sub-s. (*b*), had been made out. It is said, however, that this Court ought to find that s. 11, sub-s. (*b*), applies, because of the finding of the arbitrator that the increased letting value of the holding arose from improvements made by the tenant on the land, and consequently that the increased rent must have been demanded by the landlords by reason of the increased value of the holding due to the matters enumerated in paragraph 7, (*b*) and (*c*), of the case. It does not necessarily follow, however, that the increased rent was demanded in consequence of those matters. It may arise from other causes, and if it has not been proved to the arbitrator's satisfaction that the reason why higher rent was demanded was because of an increase in the value of the holding caused by the execution of the tenant's improvements, it is impossible to say that the learned county court judge was wrong. The claim of the appellant therefore fails under sub-s. (*b*) as well as under sub-s. (*a*) of s. 11. I have great doubt whether the language of Order XL., r. 3, of the County Court (Agricultural Holdings) Rules, 1909 (1.), entitling the Court to draw inferences of law and fact can apply to a case where there is, as here, a clear finding of an absence of the necessary fact.

Appeal dismissed.

Solicitors for the tenant: *Spencer, Gibson & Son.*
Solicitors for the landlords: *Bowker, Weldon & Bowker.*

W. J. B.

GELMINI *v.* MORIGGIA AND ANOTHER.

[1912 G. 1795.]

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April 24.

Limitations, Statute of—Action commenced "within six years next after the cause of such action"—Inclusion of Day on which Cause of Action arises—Expiration of Six Years on Sunday—Issue of Writ on following Monday—Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Rules of the Supreme Court*, 1883, *Order* LXIV., *r.* 3.

By s. 3 of the Limitation Act, 1623, "All actions . . . . shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) . . . . within six years next after the cause of such actions or suit."

The time for payment of a promissory note expired on Saturday, September 22, 1906. The writ in an action upon the note against the makers was issued on Monday, September 23, 1912:—

Held, that inasmuch as the cause of action was complete at the commencement of September 23, 1906, that day must be included in calculating the six years within which the action could be brought under the statute; that therefore the six years expired on Sunday, September 22, 1912, and the writ was issued too late.

By the Rules of the Supreme Court, 1883, Order LXIV., r. 3, "Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open":—

Held, that, although for the purpose of calculating the time for doing anything required to be done by the Rules of the Supreme Court, 1883, if the time expires on a Sunday the following Monday (if the offices are open) is to count as if it were the Sunday, the rule has no effect upon the operation of the Limitation Act, 1623, and did not prevent the issue of the writ being out of time.

The decision upon this point in *Morris* v. *Richards* (1881) 45 L. T. 210, followed.

ACTION tried before Channell J. without a jury.

The action was brought by the plaintiff against the defendants as makers of a joint and several promissory note for 313*l.* 10*s.*, dated December 20, 1905, payable nine months after date to the plaintiff or his order. The plaintiff also claimed 90*l.* as interest on the sum payable by the note from September 23, 1906, to the date of the writ, namely, September 23, 1912.

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Alternatively the plaintiff claimed the same sum of 313*l.* 10*s.* under a written agreement made between the plaintiff and the defendants and dated September 23, 1906 (in mistake for September 24, 1906), whereby the defendants agreed, in consideration of time then given to them by the plaintiff, to pay the said sum by instalments or otherwise as therein mentioned.

By their defence the defendants (inter alia) pleaded that "the alleged debt which is claimed in respect of the said alleged promissory note did not accrue within six years before this action, and was and is barred by the Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3."

The only question material to this report was whether the writ (so far as the claim upon the promissory note was concerned) was issued one day too late.

The time for payment of the promissory note (including days of grace) expired on Saturday, September 22, 1906. The writ in the action was issued on Monday, September 23, 1912. By s. 3 of the Limitation Act, 1623, "All actions . . . . shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) . . . . within six years next after the cause of such action or suit."

W. H. Moresby, for the plaintiff. As the last day of grace expired on September 22, 1906, in no legal sense did a cause of action exist until the following day. Therefore the cause of action first arose on September 23, 1906, and that day must be taken as the point of departure from which the six years "next after" the cause of action within the meaning of the statute must be computed. It must therefore be excluded, the rule being that when anything is to be done within a time after a certain day that day is to be excluded in the computation of the time. "Next after" is equivalent to "from." The issue of the writ on September 23 was therefore in time: *Lester* v. *Garland* (1); *Goldsmiths' Co.* v. *West Metropolitan Ry. Co.* (2); *Browne* v. *Black* (3); *Russell* v. *Ledsam* (4); *Kennedy* v. *Thomas* (5);

(1) (1808) 15 Ves. 248.
(2) [1904] 1 K. B. 1.
(3) [1911] 1 K. B. 975.
(4) (1845) 14 M. & W. 574.
(5) [1894] 2 Q. B. 759.

Darby and Bosanquet on Statutes of Limitation, at p. 31; Stroud's Judicial Dictionary, article "Cause of Action." Further the writ, although issued on Monday, September 23, 1912, must be deemed to have been issued on Sunday, September 22, 1912. By Order LXIV., r. 3, "Where the time for doing any act or taking any proceeding expires on a Sunday . . . . and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open." This writ was issued when next, after the Sunday, the offices were open. The Court is not bound by the decision in *Morris* v. *Richards* (1) that this rule (which corresponds to the former Order LVII., r. 3, upon which that decision turned) does not affect the operation of the Limitation Act, 1623.

T. M. Healy, K.C., and *H. Nield*, for the defendants.

CHANNELL J. Upon the point with regard to the Limitation Act, 1623, I have a very clear opinion. It is remarkable that there is no express decision upon the point after so many years, and the fact that it is now raised by Mr. Moresby for the first time is a proof of his ingenuity. In the text-books it is assumed that the action must be commenced within six years from the day on which the cause of action is complete, including that day. In *Morris* v. *Richards* (1), Mr. Commissioner (afterwards Mr. Justice) Wills had two points to decide: first, whether the rule as to days of grace, which was then mercantile usage, but which has since become statutory, had the force of law. He decided that it had. But he held that that rule, being established as a matter of custom, must be construed with the custom that when the last day of grace expired on a Sunday the bill or note was payable on Saturday. That decision is not of great importance because in the following year the law became statutory, nor has the case much bearing on the present case, except that everybody then assumed that if a writ had been issued under the same circumstances as in the present case, namely, on the Monday, it would have been too late. The last day upon which the writ

(1) 45 L. T. 210.

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in that case could have been issued, on that assumption, happened to be a Sunday. Mr. Commissioner Wills decided that, for the purpose of anything to be done under the Rules, the effect of Order LVII., r. 3 (which was the rule then in force and word for word the same as the present Order LXIV., r. 3), was that the Monday would be counted as if it was Sunday; but he decided that the rule had no effect on the operation of the Statute of Limitations. Although that decision was one at nisi prius, and therefore probably not binding on me, I think it was right.

The other point is, what is the true rule as to the computation of the six years under that statute? An action cannot be brought until the cause of action is complete, and in all cases of contract the person who has to pay has the whole of the day upon which payment is due in which to pay; therefore until the expiration of that day an action cannot be brought because until then there is no complete cause of action. The result is that an action cannot be brought until the next day; but it can be brought on that day because the cause of action is complete at the commencement of that day. If the cause of action is not complete, the action cannot be brought. It therefore follows that that day is one of the days upon which the action can be brought. The words of the statute are "within six years next after the cause of such action or suit." Now the day after that on which the debtor's time for paying expires is, in my opinion, the date on which the cause of action arises, and on that day an action can be brought, and that day is the first of all the days in the six years. Therefore, assuming that the day upon which the action can be brought to be a Thursday, and the period for bringing the action to be a week, the creditor can bring it at any time up to and including the following Wednesday, but not the Thursday. And the same rule applies where the period, as under the statute, is six years. I do not think that the day on which the cause of action arises is excluded. It is the previous day which is excluded, i.e., the day at the expiration of which the cause of action becomes complete. Any other construction would place upon the statute an interpretation which has not hitherto been accorded to it. Therefore, so far as the

cause of action arises on the promissory note, the writ was issued too late.

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The plaintiff's alternative claim upon the alleged agreement was then tried, and upon that claim the learned judge gave judgment for the plaintiff.

Judgment accordingly.

Solicitors for plaintiff: *W. R. Bennett & Co.*
Solicitors for defendants: *G. Turner & Osborn.*

J. E. A.

[IN THE COURT OF APPEAL.]

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BROWNE *v.* BARBER.

Solicitor and Client—Uncertificated Solicitor—Costs and Disbursements—Not retainable by Solicitor out of Moneys of Client in his Hands—Solicitors' Act, 1874 (37 & 38 *Vict. c.* 68), *s.* 12.

The Attorneys and Solicitors Act, 1874, s. 12, provides that "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever."

A solicitor, during a time when he was not duly qualified, because he had not taken out a certificate, acted for a client in certain bankruptcy proceedings, and in anticipation that it would be necessary to deposit 125*l.* in the Bankruptcy Court as a result of those proceedings, the client deposited that sum in his solicitor's hands to be used for that purpose. It subsequently became unnecessary to make a deposit in the Bankruptcy Court, and the client directed the solicitor to retain the money for his costs. The solicitor did not deliver a bill of costs to his client, and claimed the right to retain the money in his hands to meet his costs and disbursements on behalf of his client:—

Held (reversing the decision of Channell J.), that the direction of the client was a direction to make payments proper to be made by the solicitor as a solicitor, that therefore both parties must have contemplated that a taxation would be necessary, and that s. 12 of the Solicitors Act, 1874, applied, and that the client was entitled to have repaid to him by the solicitor such of the amounts as might be disallowed on taxation.

APPEAL from the decision of Channell J. in an action tried as a short cause. The facts were as follows.

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Messrs. Durham, Stokes & Co., having, while the defendant Barber was temporarily absent in Russia, obtained a judgment against him in default of appearance and upon an order giving leave for substituted service, presented a bankruptcy petition against him, upon which petition a receiving order was made. After his return to this country the defendant instructed the present plaintiff, Browne, who was the defendant's then solicitor, and who carried on business as Woodthorpe, Browne & Co., to take proceedings to get the judgment and receiving order set aside. It was estimated that, as a condition of setting aside the receiving order, the defendant would be required to pay into Court a sum of about 125*l.*, and the defendant handed to the plaintiff the sum of 125*l.*, to be paid into Court by him if the order that was anticipated should be in fact made.

The plaintiff, acting as the defendant's solicitor, then applied to the registrar in bankruptcy to set aside the receiving order, and the registrar, instead of making the order that was anticipated, made an order dismissing the application. It became unnecessary, therefore, to pay the 125*l.* into Court, and that sum remained in the hands of the plaintiff. The defendant thereupon instructed the plaintiff to take the necessary steps to appeal against the order of the registrar and to proceed with the application to set aside the judgment. A conversation ensued between the plaintiff and the defendant, in the course of which the plaintiff pointed out that, in accordance with the Bankruptcy Rules, it would be necessary to deposit 20*l.* as security for the appeal, and that the proceedings would necessarily involve the incurring of other costs, such as counsel's fees and the plaintiff's own costs, and the defendant directed the plaintiff to apply the 125*l.* towards the payment of these costs. The plaintiff then took out a summons to set aside the judgment, and the Master made an order setting it aside on payment by the defendant of all the costs thrown away. Durham, Stokes & Co. appealed to Scrutton J., who reversed the order of the Master and required the defendant to bring the amount of the judgment debt into Court and to pay all the costs, including the costs of the bankruptcy proceedings. Appeals by the defendant to the Court of Appeal against the order of Scrutton J. and the order of the bankruptcy registrar

were dismissed. The plaintiff applied the 125*l.* which had been handed to him by the defendant in paying the deposit of 20*l.* on the appeal in the bankruptcy proceedings, in payment of counsel's fees, and other costs.

The vast majority of these proceedings took place between November 15, 1911, and December 15, 1911.

By inadvertence the plaintiff had omitted to obtain his certificate as a solicitor under the Solicitors' Act, 1860, for the year ending November 15, 1912, until December 18, 1911. By s. 22 of that Act, "Every certificate issued by the registrar between the 15th day of November and the 16th day of December in any year shall bear date on the 16th of November, and shall take effect on that day for all purposes, provided it be stamped before the 16th day of December; and in every such case the 16th day of November shall, for the purpose of this Act, be deemed to be the date of the payment of the duty; but if such certificate be not so stamped, it shall take effect, as regards the qualification to practise, on the day on which it is stamped . . . ." Consequently nearly all the proceedings mentioned above had been taken while the plaintiff was without a certificate entitling him to practise.

The defendant, objecting to the proposed allocation of the 125*l.* by the plaintiff, took out a summons against the present plaintiff under the Solicitors' Act, 1874, by which he asked for an order that the plaintiff should bring into Court the sum of 121*l.* 7*s.* in his hands, which was the amount estimated to be necessary to comply with the orders of Scrutton J. and the Court of Appeal. Bucknill J. after a long hearing, in the course of which witnesses were examined on both sides, held that the defendant had given the plaintiff a direction to apply the 125*l.* to the payment of the deposit on appeal and to the costs to be incurred in the proceedings for setting aside the judgment and the receiving order, and in the result dismissed the defendant's application with costs to be taxed. These costs were subsequently taxed at 141*l.* 18*s.* 6*d.*, for which sum the plaintiff sued the defendant in the present action.

The plaintiff took out a summons for leave to sign final judgment under Order XIV. The defendant in his affidavit in opposition to the summons claimed to set off the sum of 125*l.*

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on the ground that the plaintiff had no right to retain or appropriate that sum received by him for the defendant in respect of professional costs and disbursements incurred during the period while the plaintiff was not qualified to practise as a solicitor. The Master made an order giving the plaintiff leave to sign final judgment for 16*l.* 18*s.* 6*d.*, being the difference between the amount of the plaintiff's claim and 125*l.*, and giving the defendant leave to defend as to the 125*l.* The defendant paid the 16*l.* 18*s.* 6*d.* under that order, leaving the question in dispute whether he was entitled to set off the 125*l.* or any liquidated part thereof.

After trial Channell J. held that the defendant was not entitled to set off the 125*l.*, and gave judgment for the plaintiff. The following was the judgment of

CHANNELL J. This case was tried before me on Saturday last as a short cause, and it turned out to have a very substantial point in it which took a very considerable time to argue, and accordingly I reserved my judgment, not only that I might look into it a little more, but principally to enable me to take the really short cause which had been waiting some hours whilst this was being argued. Now I have to give judgment in this case.

It is an action by a solicitor against a gentleman who was formerly his client, but not his client in respect of the matters for which the action was brought. It is an action for a sum of 141*l.* which was due to the plaintiff from the defendant—it is not disputed that it was due—as the costs of certain proceedings which came on before Bucknill J. in chambers, and which were, in point of fact, contentious proceedings in which witnesses were examined orally. The hearing took several days, and the costs were ultimately taxed at this 141*l.* The defendant's answer to it is a set-off of 125*l.* He has paid under the Master's order the difference between the 125*l.* and 141*l.*, and the only point in dispute is whether he is entitled to set off 125*l.* or any liquidated part of that 125*l.* One suggestion was made that it was not properly a set-off but was only a counter-claim, because upon a view—which I think would probably be right—in any event something would have to be deducted from the 125*l.*, and that,

therefore, it was not a certain and settled account and could not be set off. I do not quite agree with that, because I think the old rule used to be that you could set off an amount which could be ascertained by mere calculation, but not when it was a matter of estimate. If anything had to be taxed here, that is a matter of calculation. Consequently I think it is a proper subject for set-off, but the real question in the action is whether the defendant could recover against the plaintiff 125*l.* or any liquidated portion of it. If he were bringing an action for 125*l.*, and if he could recover the whole of that, or any liquidated sum, he could set it off in this action; but if he could not recover it in the action brought by himself, he could not set it off in this action.

Now, the facts are these. The plaintiff is a solicitor. The defendant was abroad in the course of last year, and he had a judgment obtained against him in default of appearance and upon an order for substituted service. His case, I suppose, was that he never knew anything about it or heard anything about it. Not only was there a judgment against him, but there was a receiving order against him upon that judgment, and when he came back to this country he found himself in the position of having had a receiving order made against him in his absence, and he went to the plaintiff as his solicitor and instructed him to take proceedings to get these matters set aside.

It was supposed that the sum of 125*l.* would probably be ordered to be paid into Court as a term of getting the judgment and the receiving order set aside, and accordingly the defendant provided 125*l.* (which is this sum now in question), and paid it to the plaintiff to be used for the purpose of paying it into Court if, as was expected, an order was made that the proceedings could only be set aside upon that money being paid into Court. Then, instead of the registrar in bankruptcy making that order which was expected, he dismissed the application altogether and refused to make any order. Consequently the 125*l.* did not at any rate then have to be paid into Court and it was in the hands of the plaintiff. But the defendant wanted to appeal against the registrar's refusal to make an order, and, in bankruptcy, it is necessary to deposit 20*l.* as a security for an appeal. Accordingly, when he instructed the plaintiff to take steps to appeal, it

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was pointed out to him that the 20*l.* would have to be deposited and that other expenses and costs would have to be incurred. This was stated in a conversation between the defendant and the plaintiff's managing clerk, but the plaintiff was summoned upon the telephone, and he then took part in the conversation. As to this there was a dispute, but it was not the dispute which was before Bucknill, J., and as to which he took the plaintiff's view of the facts. It was contended at the time—and I think on the whole rightly, though I have not got to decide it—that the decision of Bucknill J. upon the very point in question made it what is called res judicata—that is to say, that the parties could not litigate it again, and that it was binding as a decision between the parties as to the facts. Upon this case coming on and that contention being made, I intimated that I was not likely to differ from Bucknill J.'s view of the same facts, and accordingly I have had before me, taking it quite shortly, the plaintiff's version of this given in evidence, and the defendant acquiescing—in consequence of what I said as to Bucknill J.'s view—has not given any contradiction, so that I have got the evidence before me as to the facts of this interview and there is no contradiction of it as to what Bucknill J. decided to be the true facts. They were, that upon this question arising as to how the costs and the deposit necessary on appeal were to be provided for, the defendant said, "Oh! take it out of the 125*l.* in your hands." Then he was asked, "Well, how about the further costs? There will be counsel's fees to pay." He said, "Take those also out of the 125*l.*" Then says the plaintiff, "There will be my costs besides," and the defendant said to him, "Very well, take those out of the 125*l.* also." So that upon those facts there is a distinct and clear direction to apply the 125*l.* to the payment of those costs that were then to be incurred. Now all this took place in the month of November last year. I think the whole, practically, of the matter that has caused any costs to be incurred took place between November 15 and December 15. If just a little was done before November 15 it was very little, and if anything was done after December 15 it was very little.

Now the facts are these: Solicitors' certificates expire on November 16 in every year, but they have a month's grace

within which to pay; and if they pay the fee for the certificate before December 16, then the certificate is granted, dates back to November 15, and, of course, covers all acts which have been done in the intermediate time; but if they do not pay by December 16, then the certificate—which of course they are entitled to still upon paying the fee—the certificate when granted if the payment is after December 16—is dated as of the day when in point of fact the payment is made, and consequently the solicitor is unprotected as to the period between November 15 and December 16 and such days as might elapse between December 16 and the day when he pays. In this case Mr. Browne, the plaintiff, omitted to pay his fee for a certificate on or after November 15, and he was two days late in doing so. He says that it was by inadvertence, and, as he is a solicitor in substantial practice,—attending, I suppose, to his clients' affairs and neglecting his own, as solicitors very often do—he omitted to pay the certificate money by pure inadvertence until two days after the proper time.

Now the question is what is the effect of that upon this work and these disbursements which happen to have been done in that particular month when he was entitled to his certificate and might have got his certificate at any time by paying the money. If he had paid it he would have got a certificate which would have dated back and covered the period, but in fact he never did so, by inadvertence, so that his certificate is dated December 18 and does not cover the period in question. Now that raises a somewhat difficult problem. It is quite clear that if he had not happened to have had the 125*l.* in hand he could not recover for his costs—I am not quite clear that he could not recover his disbursements, though it is possible he might. As I have stated, it is perfectly clear that he could not recover his costs—that much is quite clear; but it is not quite clear what the effect is of his having money in his hands and having express directions to apply that money to these particular purposes. First of all we have to deal with cases under the Act of 1843. Several cases are reported, or a good many cases are reported, which seem to me to a certain extent to deal with it. The first one I need deal with is *Fullalove* v.

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Parker (1), decided in the year 1862. The Act of 1860 had then passed, but it was not very material in any respect, and the case was decided upon the Act of 1843. It came before Willes and Byles JJ., and Willes J., as he generally did, not only decided the matter before him, but was good enough for the benefit of the profession and the public to give his views, which were generally sound, on matters of principle which turned up, whether they were strictly necessary to the case or not. He pointed out that the then Act of 1843 only took away the remedy of the solicitor to get his costs by action; that the debt remained as a debt; it was not prevented from becoming a debt, and was a debt; but, for the purpose of protecting the revenue, there was a difficulty imposed in the way of bringing the action, but it was only a difficulty affecting the remedy and not preventing it being a debt. It was very clear, as was pointed out, there can be no doubt about the construction of that Act of 1843; but the case of *Fullalove* v. *Parker* (1) was ultimately decided on a ground for which that was not necessary, and the consequence is that, although that is an extremely valuable opinion of Willes J., it is not an authoritative decision to that effect. Then the next case necessary to refer to—I dare say there are a great many others in chronological order between that and the next case it is necessary to refer to—is the case of *In re Jones*. (2) It came before Lord Romilly M.R., and there the dictum of Willes J. in *Fullalove* v. *Parker* (1) was brought to his attention and he distinctly adopted it. He says: "This shews clearly that in the judgment of the Court the debt was not destroyed. This is evident from the observations of Willes J., who, after stating that the application was made too late, proceeded thus: 'If the attorney is really uncertificated he is not entitled to recover any costs: nor is the plaintiff entitled to recover such costs from the defendant except in this case only—if the plaintiff has made advances to the attorney he cannot recover them back upon a condictio indebiti'"—I do not know whether the Bar can translate that, but I think it is a misprint (3)—"'as for money paid

(1) (1862) 12 C. B. (N.S.) 246; 31 L. J. C. P. 239, 240.

(2) (1869) L. R. 9 Eq. 63.

(3) [It would rather seem that Willes J. deliberately used a Roman law term which was apt though not usual. The citation is from the Law Journal report.—F. P.]

under a mistake, the attorney, though uncertificated, is entitled to retain the money so advanced, and the plaintiff would have a right to recover this amount from the defendant.'" Then he quotes Byles J. also. He clearly adopts that: he not only adopts it, but it is the ground of his decision, and therefore by that time one had got not only a dictum to that effect but a decision to that effect. That still remains. It is quite true that the result in *In re Jones* (1) would have been different, and the decision different, if the Act of 1874 had then passed, because the decision in *In re Jones* (1) was that a solicitor could recover his costs although he had not got a certificate at the time under the process of a taxation where there had been a taxation on ordinary terms of a common order, as it was called, which included an undertaking to pay; that that was a procedure which was not an action, and in that the solicitor could under the then law have recovered his costs. But he cannot so recover them now, because in the corresponding section of the Act of 1874 there are words included which prevent that, because it says that "No costs . . . . on account of or in relation to any act or proceeding done or taken by any person who acts as attorney or solicitor without being duly qualified so to act, shall be recoverable in any action, suit, or matter"; and that word "matter" is a technical word which covers all suits in the Court; it has been so decided, and there can be no doubt that now upon a taxation in an ordinary form, if a solicitor has not got a certificate, he does not recover his costs, although *In re Jones* (1) stated that he could, because there has been an addition to the Act of Parliament by adding that word "matter," and "matter" covers "taxation." Therefore in a taxation he cannot recover. There is no doubt about that proposition. Then there was another case which was referred to under the old Act, which I have not got here, but I have got a case which overrules it, and that is sufficient—it is the case of *Reeder* v. *Bloom* (2)—quite an old case, which decided that under the Act of 1797 although the solicitor could not recover, yet where the solicitor for the plaintiff was uncertificated that did not prevent the plaintiff himself recovering the costs from the defendant; but that case, I venture to think, was

(1) L. R. 9 Eq. 63. (2) (1825) 3 Bing. 9.

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somewhat doubtful from the first. It has clearly been overruled in the case of *Fowler* v. *Monmouthshire Canal Co.* (1) I think it is overruled by that case on two or three grounds, first, that, if it ever was right, the words of the subsequent statute of 1874 have prevented it continuing to be right, because in the statute of 1874, instead of saying simply that the attorney shall not recover, it says that the amount shall not be recoverable, and that means therefore, of course, not recoverable by anybody. That would have been sufficient to make the decision of *Reeder* v. *Bloom* (2) wrong. But, in addition to that, it probably was always wrong on the ground pointed out by the Court in *Fowler* v. *Monmouthshire Canal Co.* (1), namely, that costs being only an indemnity, if the solicitor could not recover from the plaintiff, then, as the plaintiff was only entitled as against the defendant to the indemnity, if he could not be liable to his own solicitor, the other party could not be liable to pay them to him when he was not liable to his own solicitor. Therefore that case must be treated as wrong from the beginning, and I only deal with those cases because counsel seemed to think that they were important. They are important to this extent, that they do shew that there is an alteration in the law as it was when explained by Willes J. and Lord Romilly M.R.—there is an alteration between the then law and the present law, and these cases do shew that. But to what extent they are important is a different matter. Then comes the case which, I think, was the defendant's strongest case, and that is the case of *Kent* v. *Ward*. (3) There the facts were these, that a plaintiff had acted as solicitor in an action and brought this action to recover an account alleged to be due to him upon his bill of costs. For a short time during the proceedings he also allowed the certificate to lapse, but it was a question of a few items only—some small items—and there was a sum which had been paid on account of costs generally, or supposed to have been—I believe even that was in controversy, as I understand the judgment—but there was a sum which was given credit for in the bill—there was a considerable bill—there were some comparatively small items

(1) (1879) 4 Q. B. D. 334. (2) 3 Bing. 9.
(3) (1894) 70 L. T. 612.

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that arose during the time that the solicitor had not got a certificate. The Divisional Court had held that the plaintiff, the solicitor, was entitled to the whole balance found due on his bill on taxation without deduction of the amounts and the items which had arisen during the time when he had not got his certificate, because the sum paid on account generally was larger than those, and the Court held that the solicitor had a right to appropriate the sum which he had in hand as against the items which otherwise would have been disallowed; and, that being so, as he had that right, he was entitled to the whole balance. Now the ultimate decision of the Court of Appeal, to which Court the case went, was that he never had appropriated. That was the decision. If that was all, it would, of course, have left the decision standing upon the law but overruled upon facts only. The importance of the case is that Lord Esher M.R. gives quite a distinct opinion, and Lord Davey also gave an opinion to the effect that he was not entitled to appropriate. Lord Esher deals with a matter which is important in this case upon other grounds, namely, the question of the express authority. He says: "This bill of costs, therefore, upon which the plaintiff was suing as a solicitor for work done, and for disbursements made as a solicitor, was sent to the Master to be taxed as a solicitor's bill. As to the disbursements charged in the solicitor's bill, what is the legal effect of disbursements? If the solicitor has no particular authority from his client to make disbursements, what authority has he? Disbursements are money paid on behalf of the client. If the solicitor has no express authority, yet he can recover for disbursements, because the law implies from his character as a solicitor that he has authority to make them for his client. If he makes disbursements when he is not a solicitor, and has no express authority, there is no such implied authority. He cannot then recover the disbursements as a solicitor, or in any other capacity, because he had no authority, express or implied, to make them. What then is the position of this solicitor as to certain claims which are in dispute? He delivered briefs as a solicitor when, though he was a solicitor, he had not got a certificate. A solicitor has one month's grace within which to

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take out his certificate, but this solicitor did not take out his certificate within that month, but afterwards." It is exactly the same as in this case. "His certificate, therefore, took effect from its date. He was, therefore, an uncertificated solicitor until he took out his certificate. Could he, during that time, act as a solicitor? I think not, and that he could not make any one liable to him as a solicitor; he would be liable to a penalty for acting as a solicitor. In this case, then, acts were done by the solicitor during the period when he was uncertificated; he delivered briefs, and the time for refreshers becoming payable occurred during that period. Therefore, if he was a certificated solicitor when the disbursements were made, yet they were disbursements 'on account of or in relation to' an act done by him while he was not duly qualified within the meaning of s. 12 of the Solicitors' Act, 1874. It is clear then that he cannot recover those disbursements, and in this action he has sued as a solicitor to recover them. It is argued on his behalf that, even if he could not recover these disbursements in an action, yet money has been paid to him by the client on account generally, and that he has a right to allocate that money to any items of his claim which he chooses, and that he has done so in respect of these disbursements. If it were true that money was paid to him generally on account, I am of opinion that he cannot allocate any part of that money to items which he could not recover from his client. I doubt whether the rule about appropriating payments applies at all to such a case. Therefore, even if money was paid to him on account generally, he cannot appropriate any part of it to these items. But even if money was paid to him on account generally, he has not, in fact, appropriated any part of it to these items. That is only now suggested. It seems to me, therefore, clear that this appeal must succeed, and these items be disallowed, and the amount of the judgment for the plaintiff be reduced accordingly."

Now that decision is a decision to the effect that in that case, even if he could have appropriated, he had not done so; but there is the strong opinion of Lord Esher M.R. that he could not allocate payment that he has received to an item which he could not recover. Allocating items to an amount that he could

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not recover means allocating them to an item that he could not recover when there were others which he could recover and to which it would be appropriate. It does not follow from that that Lord Esher thought that, if there were no items to which payment on account could properly be appropriated, that then the money on account might be recovered back. That does not follow at all; and it seems to me to be a very different proposition. But there is the strong opinion of Lord Esher that it could not be allocated, which goes a considerable way to support the defendant's contention in this case. Then comes A. L. Smith L.J., who simply said it was not necessary to decide whether he could allocate or not because he never in fact did so, and he gave no opinion. But Lord Davey went a little bit further, and he said: "The solicitor then says that he will allocate a part of these payments to these disputed items. It is unnecessary to decide whether he can do so. I am inclined to agree with the Master of the Rolls that a solicitor cannot allocate payments on account to items which are not recoverable from his client." So that he inclines to that opinion, but decides it, as the others did, on the ground that there was no allocation in fact. The difficulty in that case was that, although it was not a decision, one naturally respects the opinion of such judges as Lord Esher M.R. and Davey L.J., and they did incline to the opinion that a solicitor cannot allocate a payment on account to items that are not recoverable. But I do think it is an opinion that he cannot allocate it when there are items to which it can properly be appropriated and to which, in that case, they had in fact been appropriated by the usual appropriation account in the earlier items. So far, therefore, there is no very distinct authority up to the present stage.

Then we come to a case before North J., *In re Sweeting* (1), and that is the case which overrules the case of *In re Jones* (2), which I have already mentioned. There the headnote is: "In taxing a solicitor's bill of costs, items relating to business done while the solicitor had not a certificate must be disallowed." That overrules *In re Jones* (2); but I think that the real reason for it is that which I have already given, namely, that "in the

(1) [1898] 1 Ch. 268. (2) L. R. 9 Eq. 63.

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matter" had been added to "in an action," and that he cannot recover it "in the matter," and that taxation is clearly "in a matter." It is "in re," which is Latin for "in a matter," and that is the main thing. But he does go on to say, no doubt, that the present Act is much stronger. So it is in many respects. It says that the sum shall not be recoverable—and that means shall not be recoverable by anybody, which is an extension of the earlier Act, which said that the solicitor himself shall not recover and it also adds—"suit or matter," and things of that sort, as to the proceedings in which he could recover, but still it deals substantially with the question of recovery. Now is that an authority upon the point which I have got to deal with, which is this, whether, when the client has paid money—and paid money, I suppose I may take it, upon the supposition (because he did not know anything about this certificate) that the solicitor had got his certificate in the ordinary way—is he, upon finding that he had not, entitled to recover it back? It is not a question of allocating it against particular items, but has he a right to recover it back? because, unless he has a right to recover it back, it seems to me that he cannot set it off in this particular action.

Now on what ground does he recover it back? There is a possibility of contending upon the construction of s. 12 of the Act of 1874 that not merely is it a case, as under the former case as explained by Willes J., that the debt remains and only a difficulty in the way of recovering it, but it is possible to say that that is altered by s. 12 for this reason. Sect. 12 has got in its second paragraph the corresponding clause about "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit or matter by any person or persons whomsoever." In addition to that it has got the first clause, which says, "Any person who wilfully and falsely pretends to be or takes or uses any name, title, addition or description implying that he is duly qualified to act as an attorney or solicitor, or that he is recognized by law as so qualified, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding the sum of 10*l.* for each such offence." Then the third clause is,

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"For the purposes of this section,"—that is, for the whole section, both the second clause and the first—"a person shall be deemed to be duly qualified to act as an attorney or solicitor if he shall have in force at the time at which he acts as an attorney or solicitor a duly stamped certificate, authorising him so to do, pursuant to the provisions of the Stamp Laws . . . . or shall have been appointed to be Solicitor of the Treasury," and so on. So that it follows that the uncertificated solicitor might be prosecuted under the first clause for representing himself to be duly qualified and be liable to a penalty, a penalty not exceeding 10*l*. Now does that make a difference, and does it make work done during the time that the solicitor has not got a certificate, not, as it used to be, a good debt, but with a difficulty in the way of recovering it—does it make it a matter tainted with illegality because there is a penalty attached to it? There are words in the judgment of Lord Esher which I have read which possibly indicate that he took that view. I am not sure that they do, because he says that the solicitor can be liable to a penalty for acting as a solicitor—he uses those words, but I do not really think that that can be so. And as regards the solicitor, who, as I said, is entitled to his certificate upon paying the money, and upon paying it will get a protecting certificate dating it back, I cannot think that during the time—during that month of grace when he could merely by paying the money cover himself not only as to the future but as to the past—I cannot think that during that time he is acting illegally. He is acting at his own peril, and at the peril of incurring great difficulties, at any rate, and with a certainty that he cannot recover unless he does pay in time; but I do not think it could possibly be said that it is illegal. If it was so, it does not help the defendant to recover, because he did not know anything about it. The ground on which the defendant could recover, if at all, is that he paid it under a mistake, a mistake in believing that the plaintiff was certificated, or gave his directions to deduct the money, as it is not a question as to whom he paid the money in fact in this case. It is when he gave the directions to apply the money that he did it under a mistake, believing that the plaintiff was duly qualified. Now what is the law as to that? It seems to me that he cannot

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recover the money paid in that way under a mistake, unless he says that the consideration wholly failed. It must wholly fail, either as to the whole, or as to what is called a liquidated part of the whole; that is understood. If he has got what is called a substantial consideration for the money that he paid, then I do not think he can recover it back. Now in this case he had his work done. Take the case of the deposit of 20*l.* That really is unarguable. I think Mr. Sanderson quite fairly admitted that he had no answer to that 20*l.* The 20*l.* might have been paid by anybody else. There was the express authority to pay that 20*l.* He had the benefit of it. He had the appeal. Then as to the counsel's fees also, and as to the work done, he had his appeal. I do not know what order was made upon it, but, somehow or other, there was an amount paid into Court. I suppose it is considered in law a benefit to a party to have his case argued, whether he succeeds or not; it may be, and at any rate he got that which he desired. I cannot say that this consideration for which he gave those directions wholly failed. It was a perfectly legitimate thing when it was done; but by the curious effect of this sort of doctrine of relation he did not get his certificate quite in time to cover him, and I think that, although the solicitor could not have recovered in respect of anything which he did as a solicitor, he could have recovered the 20*l.* if he had paid it on an express authority to pay it into Court. But he could not have recovered anything that he had not express authority for. But then he had express authority in this case—direct authority. Therefore he did not seem to want the position of solicitor for any of these disbursements. Then the real question is as to his own costs. I personally think that, under the circumstances, he was directed expressly to apply this money that he had got in hand to his own costs as well as to the disbursements, and that the principle applies that the defendant cannot recover because the consideration has not wholly failed, and that the plaintiff is in the fortunate position that although he could not have sued for these things, except possibly the 20*l.*, yet, having got this money in hand beforehand, and it not being a question of allocating between items—some of which are good for all purposes and some of which are irrecoverable, which is the case

before Lord Esher—I think on the whole that the defendant could not recover this money and therefore cannot set it off.

The only point therefore that remains is the possibility—and it is no more than a possibility—that these costs when taxed would not come to the 125*l.* What I was told about this was that they have not been taxed, they have not been ascertained. The solicitor has not delivered his bill. Very naturally, he says, he was advised not to, because he was advised to stand on this payment and not to do anything which would lead to taxation. But if it should be the fact that the fair amount payable to the solicitor for the work done, excluding the disbursements, when properly ascertained, did not come to the 125*l.*, then, of course, there would be a balance in his hands which would be a subject of set-off, because it would become by the ascertainment a liquidated amount. Therefore I think if the parties desire to have an inquiry about that they might have it. But, upon the figures, it does not seem to be any good. I am told that the amount of the bill made out is 182*l.* including the 20*l.* and 162*l.* without it; so that they have got by taxation to reduce 182*l.* to 125*l.*, or rather to reduce 162*l.* to 125*l.*, really, because the 20*l.* is an item on both sides, and it does not seem probable that that will take place. But, if it is desired, I suppose I could not refuse a proper inquiry as to that. I do not think it would be a taxation under the Solicitors' Act, and it would have to be applied for at their peril, and I do not think it ought to be used as a ground for getting out of paying the 141*l.* I think I must give judgment for the plaintiff for, not 141*l.*, but 125*l.*—125*l.* in addition to the 16*l.* that has already been paid. I give judgment for that.

The defendant appealed.

Sanderson, K.C., and *Douglas Hogg*, for the defendant. The case comes within s. 12 of the Solicitors' Act, 1874. It is not in principle distinguishable from *Kent* v. *Ward* (1), although in that case no doubt the solicitor was suing to recover the amount of his costs from his client. In *In re Jones* (2) it was held that

(1) 70 L. T. 612.

(2) L. R. 9 Eq. 63.

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an uncertificated solicitor could retain his costs, though he could not recover them; that case was approved by the Court of Appeal in *In re Hope*. (1) But it has been held that *In re Jones* (2) has no application to the Act of 1874; see *In re Sweeting* (3); *Fowler* v. *Monmouthshire Railway and Canal Co.* (4) Under the Act of 1874 the successful party in legal proceedings cannot, where the solicitor employed by him is uncertificated, recover on taxation his costs and disbursements from the party otherwise liable. A solicitor cannot be in a better position by not delivering a bill of costs; if he had delivered a bill, he would not have been allowed to say "I retain for myself moneys as against items of work done when I was uncertificated." What the defendant authorized the plaintiff to do was to pay the items for which the defendant was legally liable. The direction was not equivalent to saying "Though I am not liable to you, you may pay yourself."

C. A. Bennett (*Lewis Thomas, K.C.*, with him), for the plaintiff. The work was done while the plaintiff was qualified or might have become qualified by taking out his certificate. The subsequent failure of the solicitor to take out his certificate does not make what he has already done illegal; he was doing something that he was entitled to do. The jurisdiction under the Solicitors' Act to tax a solicitor's bill of costs cannot affect the right of a solicitor to retain moneys paid to him by a client.

[VAUGHAN WILLIAMS L.J. The contract was that the client said "Pay yourself the costs out of the money in your hands"; that must mean proper costs, subject to taxation; and on taxation items incurred while the solicitor was uncertificated would be disallowed.]

Taxation is not a proceeding in which the solicitor is seeking to recover, and there would be no necessity for the Master to strike out items. There was in fact a debt. What the solicitor did during the days of grace resulted in a debt, though it may be that it was unenforceable.

Sanderson, K.C., in reply. The money was originally paid to the solicitor for an express purpose; this turned out to have

(1) (1872) L. R. 7 Ch. 766.
(2) L. R. 9 Eq. 63.
(3) [1898] 1 Ch. 268.
(4) 4 Q. B. D. 334.

been unnecessary, and the client directed him to keep out of the money such costs as he should be legally entitled to. *In re Sweeting* (1) is decisive of the present case, the only difference being that in that case there was a formal submission by the client to pay. On the facts of the case there was nothing more than a general direction, which must be to pay costs which the client was properly liable to pay. It would be an extraordinary position if the solicitor, being unable to recover his costs, should be able to retain them out of moneys of the client in his hands.

Cur. adv. vult.

March 4. VAUGHAN WILLIAMS L.J. The question in this appeal is whether the defendant can recover against the plaintiff 125*l.* or any part thereof as money paid to the plaintiff to the use of the defendant. The plaintiff acted as solicitor for the defendant in certain bankruptcy proceedings, and in the Bankruptcy Court it was expected that a sum of 125*l.* would have to be paid as a deposit; it turned out that no order was made in the Bankruptcy Court, and therefore the 125*l.* which had been paid to the solicitor to enable him to pay the deposit was not wanted for that purpose. A question arose as to how the plaintiff's costs were to be provided for, and the defendant said, "Take them out of the 125*l.*" Channell J. found that on the facts there was a distinct and clear direction to apply the 125*l.* to the payment of the costs that were then to be incurred. I think that, having regard to certain proceedings before Bucknill J. in chambers and to the discussion as to what the facts relating to the direction were, we ought to take the account which I have just quoted as being true in fact. Channell J. in his judgment goes on to say: "Now, the facts are these. Solicitors' certificates expire on November 15 in every year, but they have a month's grace within which to pay; and if they pay the fee for the certificate before December 16, then the certificate is granted, dates back to November 15, and, of course, covers all acts which have been done in the intermediate time; but if they do not pay by December 16, then the

(1) [1898] 1 Ch. 268.

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certificate—which of course they are entitled to still upon paying the fee—the certificate when granted if the payment is after December 16 is dated as of the day when in point of fact the payment is made, and consequently the solicitor is unprotected as to the period which has elapsed between November 15 and December 16 and such days as might elapse between December 16 and the day when he pays. In this case Mr. Browne, the plaintiff, omitted to pay his fee for a certificate on or after November 15, and he was two days late in doing so. He says it was inadvertence, and, as he is a solicitor in substantial practice,—attending, I suppose, to his clients' affairs and neglecting his own, as solicitors very often do—he omitted to pay the certificate money by pure inadvertence until two days after the proper time. Now the question is what is the effect of that upon this work and these disbursements which happen to have been done in that particular month when he was entitled to his certificate and might have got his certificate at any time by paying the money. If he had paid it he would have got a certificate which would have dated back and covered the period, but in fact he never did so, by inadvertence, so that his certificate is dated December 18 and does not cover the period in question. Now that raises a somewhat difficult problem. It is quite clear that if he had not happened to have had the 125*l.* in hand he could not recover for his costs—I am not quite clear that he could not recover his disbursements, though it is possible he might. As I have stated, it is perfectly clear he could not recover his costs—that much is quite clear; but it is not quite clear what the effect is of his having money in his hands and having express directions to apply that money to these particular purposes."

The plaintiff's counsel in his argument relied (inter alia) upon certain observations made by Lord Esher M.R. and Davey L.J. in *Kent* v. *Ward*. (1) The head-note to the report of that case runs thus: "The Attorneys and Solicitors' Act, 1874, provides, by s. 12, that 'no costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being

(1) 70 L. T. 612.

duly qualified so to act, shall be recoverable in any action suit or matter by any person or persons whomsoever.' A solicitor, during a time when he was not duly qualified, because he had not taken out a certificate, delivered briefs to counsel, and the trial took place during that period, and refreshers became payable. After he had taken out his certificate he paid fees in respect of those briefs and refreshers. He sued his client to recover the amount due upon his bill of costs, which included those fees, and judgment was given for the amount appearing to be due upon the bill, the bill to be taxed. Held (reversing the judgment of the Queen's Bench Division) that these fees were 'disbursements on account of or in relation to an act or proceeding done or taken' while the solicitor was not duly qualified, and that they ought to have been struck out of the bill on taxation." A good deal turns upon how far that case applies to the present one. I will now read the observations which have been relied upon by the plaintiff's counsel. Lord Esher, M.R., says (1): "This bill of costs, therefore, upon which the plaintiff was suing as a solicitor for work done, and for disbursements made as a solicitor, was sent to the Master to be taxed as a solicitor's bill. As to the disbursements charged in the solicitor's bill, what is the legal effect of disbursements? If the solicitor has no particular authority from his client to make disbursements, what authority has he? Disbursements are money paid on behalf of the client. If the solicitor has no express authority, yet he can recover for disbursements, because the law implies from his character as a solicitor that he has authority to make them for his client. If he makes disbursements when he is not a solicitor, and has no express authority, there is no such implied authority. He cannot then recover the disbursements as a solicitor, or in any other capacity, because he had no authority, express or implied, to make them. What then is the position of this solicitor as to certain claims which are in dispute? He delivered briefs as a solicitor when, though he was a solicitor, he had not got a certificate. A solicitor has one month's grace within which to take out his certificate, but this solicitor did not take out his certificate within that month, but afterwards. His certificate,

(1) 70 L. T. 612, at p. 613.

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therefore, took effect from its date. He was, therefore, an uncertificated solicitor until he took out his certificate. Could he, during that time, act as a solicitor? I think not, and that he could not make any one liable to him as a solicitor; he would be liable to a penalty for acting as a solicitor." I may say, so far as that is concerned, that I do not find it in the present case, for there is no suggestion of acting falsely and maliciously on the part of the plaintiff. Lord Esher continues: "In this case, then, acts were done by the solicitor during the period when he was uncertificated; he delivered briefs, and the time for refreshers becoming payable occurred during that period. Therefore, if he was a certificated solicitor when the disbursements were made, yet they were disbursements 'on account of or in relation to' an act done by him while he was not duly qualified, within the meaning of s. 12 of the Solicitors' Act, 1874. It is clear then that he cannot recover these disbursements and in this action he has sued as a solicitor to recover them. It is argued on his behalf that, even if he could not recover these disbursements in an action, yet money has been paid to him by the client on account generally, and that he has a right to allocate that money to any items of his claim which he chooses, and that he has done so in respect of these disbursements. If it were true that money was paid to him generally on account, I am of opinion that he cannot allocate any part of that money to items which he could not recover from his client. I doubt whether the rule about appropriating payments applies at all to such a case. Therefore, even if money was paid to him on account generally, he has not, in fact, appropriated any part of it to these items. That is only now suggested. It seems to me, therefore, clear that this appeal must succeed, and these items be disallowed." I do not wish to make my judgment unnecessarily long, but if one reads the judgment of Davey L.J. it will be seen that he clearly affirms the propositions of Lord Esher M.R. I wish here to point out that the plaintiff in his action to recover 141*l.* did not rely on any bill of costs in the bankruptcy proceedings, and on the advice of counsel did not deliver a bill of costs in those proceedings. Channell J. in his judgment, after going through the cases, cites the passages from

the judgment of Lord Esher M.R. which I have just quoted. From what I have read from *Kent* v. *Ward* (1) it is plain that it was not a decision on the same sort of facts as those in the present case. The sum of money paid in that case was paid generally, and the question was whether the solicitor had the right to allocate it to such items as he chose. It was held that in respect of general sums there was no right of allocation, and that, even if there were such a right, the solicitor had not exercised it. The observations of Lord Esher M.R., though not absolutely necessary, are a sort of obiter dicta that many of our best judges made a practice of giving utterance to, and Channell J. refers to the practice in this respect of Sir James Shaw Willes. Lord Esher M.R. made these observations, which are confirmed by Davey L.J., and we ought to pay the utmost respect to them. I wish to mention here about the payment in question in this case, the 20*l.* paid into the Bankruptcy Court, if we accept it as a payment which cannot be recovered. Channell J. says as to this: "If he has got what is called a substantial consideration for the money that he paid, then I do not think he can recover it back. Now in this case he had his work done. Take the case of the deposit of 20*l.* That really is unarguable. I think Mr. Sanderson quite fairly admitted that he had no answer to that 20*l.* The 20*l.* might have been paid by anybody else. There was the express authority to pay that 20*l.* He had the benefit of it. He had the appeal. Then as to the counsels' fees also, and as to the work done, he had his appeal. I do not know what order was made upon it, but, somehow or other, there was an amount paid into Court. I suppose it is considered in law a benefit to a party to have his case argued, whether he succeeds or not; it may be, and at any rate he got that which he desired." Then Channell J. deals with the case of *Kent* v. *Ward* (1) and goes on to say, "by the curious effect of this sort of doctrine of relation he did not get his certificate quite in time to cover him, and I think that, although the solicitor could not have recovered in respect of anything which he did as a solicitor, he could have recovered the 20*l.* if he had paid it on an express authority to pay it into Court."

(1) 70 L. T. 612.

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I think I have now read enough to shew the ground on which it is necessary that we should deal with this case. To a large extent I agree with the judgment of Channell J.; but I think that *Kent* v. *Ward* (1) and the observations of Lord Esher M.R. and Davey L.J. are binding upon me, or would be binding in a similar case. All I desire to make clear is that nothing in my judgment is intended to throw any doubt upon those observations, or to throw any doubt upon the principle that where money is paid by a client to his solicitor with express authority as to its use he cannot recover it. In a case in which there is no necessity for taxation and no necessity for any employment of the legal acquirements of a certificated solicitor those observations would no doubt be very germane; but in this case I have come to the conclusion that the observations of Lord Esher M.R. and Davey L.J. do not apply. Except as to the 20*l*., taxation is absolutely necessary, because there was not an instruction or direction to pay a qualified sum of money, but to "pay," that is, to make payments proper to be made by him as a solicitor, and the moment you come to the conclusion that the amount was ascertained and that the payments were to be made by him as a solicitor both parties must have contemplated that a taxation would be necessary, and therefore the Solicitors' Act, 1874, applies, and I am of opinion that the defendant is entitled to have some of the money repaid by the solicitor to him, because the solicitor could only have arrived at the amount by taxation, and on taxation some of the items might be struck out.

I have one observation to make as to disbursements. It is said that disbursements by the solicitor out of his own pocket and out of moneys provided by his client are all properly included, when a bill of costs is carried in, as disbursements. I quite agree, and have not said a word against that view. If this had been a case of a direction to pay a specific amount no taxation would be necessary. For these reasons I am of opinion that this appeal must be allowed.

FARWELL L.J. I have also come to the conclusion that it is clear that this appeal must succeed. It seems at first sight hard

(1) 70 L. T. 612.

that the lapse of two days should have this effect, but we have to construe the Act of Parliament as we find it. The provisions of the Solicitors' Act, 1874, are provisions of greater stringency than those of previous statutes. The words of s. 12 of that Act are, "No costs, fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit or matter by any person or persons whomsoever." Wider words it would be difficult to find. With reference to the meaning of "disbursements," it is said in *In re Remnant* (1), and the passage is thus cited in Cordery on Solicitors, 3rd ed. p. 295: "There is a distinction between a solicitor's bill which properly includes all disbursements made by him as solicitor, and his cash account which includes payments made by him as agent rather than solicitor. The distinction is embodied in a certificate signed by the taxing Masters in Chancery, their opinion being that such payments as the solicitor in the due discharge of his duty is bound to make (whether his client furnishes him with money for the purpose, or with money on account or not), as, e.g., Court fees, counsel's fees, expenses of witnesses, agents, stationers or printers, are properly introduced into the bill, but that payments which the solicitor is not bound either by law or custom to make, as, e.g., purchase-moneys or interest paid into Court, damages or costs paid to opponent parties, bills due to the solicitor of trustees, mortgagees, or other parties, legacy, or residuary duties, or other payments of a like description, are properly charged in the cash account; also that the question is not affected by the statement of the cash account between the solicitor and the client; and that, e.g., counsel's fees would not the less properly be introduced into the bill of costs as a professional disbursement because the client may have given money expressly for paying them; and that purchase-money or damages would not be properly so introduced though the solicitor may have advanced the money out of his own funds."

The sum in question in the present case relates partly to the solicitor's own costs and partly to counsel's fees. The solicitor

(1) (1849) 11 Beav. 603.

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had in hand moneys of his client entrusted to him for a different purpose, which proved ineffectual; there was a general direction to retain on account 125*l.* in respect of counsel's fees and his own costs. This must be construed as limited to taxed costs; it cannot be a general agreement to allow him any costs, which would require to be in writing. The result is that there was an instruction to the solicitor to retain the money in payment of his own taxed costs and of counsel's fees. But the solicitor was uncertificated at the time when he did the work, and therefore he could not recover the money; it is said, however, that he can set it off, but it is clear that that applies only to what he could get on taxation. *In re Sweeting* (1) is an authority for that proposition. It is clear, from the decision of North J., that if he had paid out of pocket expenses, such as counsel's fees, he could not have recovered them, and there is nothing hard in our decision. Nothing that I say is to be taken to extend to the case of an express agreement to pay for the retainer of counsel, in which case no taxation is necessary because you are relieved from it by the express intention of the parties, and *Kent* v. *Ward* (2) does not affect the question. But that case does govern the present one. Lord Esher M.R. says: "If it were true that money was paid to him generally on account, I am of opinion that he cannot allocate any part of that money to items which he could not recover from his client. I doubt whether the rule about appropriating payments applies at all to such a case. Therefore, even if money was paid to him on account generally, he cannot appropriate any part of it to these items. But even if money was paid to him on account generally, he has not, in fact, appropriated any part of it to these items." He then discusses whether there had been appropriation or not. It is plain upon a consideration of *Arnold* v. *Mayor of Poole* (3) that (as stated in the headnote) "No municipal corporation (but that of London) can appoint an attorney except under the corporate seal. Therefore an attorney who has been appointed by the Mayor and town council to conduct suits, but not under seal, cannot recover his costs against the corporation. But if he has

(1) [1898] 1 Ch. 268. (2) 70 L. T. 612.
(3) (1842) 4 Man. & G. 860.

claims in respect of costs against a corporation, some of which he can enforce, and some of which he cannot, by reason of the want of a valid appointment, and money is paid to him generally on account, he may appropriate such payments to the latter claims." In that case Tindal C.J. says: "With respect to the appropriation of a portion of the money received by the plaintiff to the discharge of the bills No. 2 and 3, it appears to us that, although the plaintiff could not have maintained an action to recover the amount of those bills, yet, as the money was paid generally on account of all the bills after these two bills were delivered, the appropriation of the money made by him at the time cannot now be questioned. The claim of the plaintiff on these two bills was a just and equitable claim, although from the absence of a contract under seal it could not be made the subject of an action in a Court of law. The case, therefore, is not like that of *Wright* v. *Laing* (1), where there were two contracts, the one lawful, the other forbidden by law, and where no specific appropriation had been made at the time of payment." I agree that this appeal must be allowed.

KENNEDY L.J. In spite of Mr. Bennett's very able argument, I have come to the same conclusion. The case, shortly put, is that the plaintiff, a solicitor, is suing to recover 141*l.* The defendant says, "You have 125*l.* of mine, and I claim to set that off." The plaintiff says, "You cannot; I was employed as your solicitor, and that money was paid to me in expectation of my getting you relief in bankruptcy proceedings. You then gave me express authority to use it in paying 20*l.* into Court, in paying counsel and in paying costs; no set-off is therefore claimable." To that the defendant replies, "You were in fact in regard to that work acting without a certificate, and you did not get it at a later date when, if you had got it, you would have had the benefit of its extending over the month of November in which you did the work. Therefore you were an uncertificated solicitor, and under the Solicitors' Acts you cannot recover." It is admitted that the plaintiff was uncertificated when he did the work, and that means that as regards disbursements and his own

(1) (1824) 3 B. & C. 165; 4 D. & R. 783.

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costs no sum could be recoverable; that does not mean only that, if his bill were taxed, he could not recover from his client; it means that the client cannot recover costs from his opponent. The result therefore is this, that, as disbursements are included in the bill of costs, in respect neither of disbursements nor of work done could anything be allowed in taxation as against the client. Under the circumstances, although it seems hard, our duty is to carry out the plain meaning of the Act. What was done was done under oral instructions, which meant "I instruct you as my solicitor to expend this money as money which can be recovered on taxation." It seems to me that, except as to 20*l.*, the claim of the defendant to set off 125*l.* succeeds.

Appeal allowed.

Solicitors for plaintiff: *Woodthorpe, Browne & Co.*
Solicitors for defendant: *C. W. & S. E. Brown.*

W. J. B.

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April 30;
May 1, 8.

[IN THE COURT OF APPEAL.]

COMMISSIONERS OF INLAND REVENUE *v.* JOICEY (No. 2).

Revenue—Mineral Rights Duty—Copyholder—Grant of Right to let down Surface—Lease of "right to work the minerals"—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 20, *sub-s.* 2.

The respondent was the owner in fee of certain copyhold lands. In 1873 the lords of the manor granted a lease of the coal and other minerals under his land to a colliery company. By the custom of the manor the lords and their lessees were entitled to work the minerals without the consent of the copyholder so long as they did not let down or injure the surface. In 1897 the respondent "demised" to the colliery company full power and liberty to work the coal under his land, without leaving any support for the surface, at a rent measured by the quantity of coal raised:—

Held, that the so-called demise was merely a release by the respondent of his right to support in consideration of a money payment, and was not a lease of a "right to work minerals" within the meaning of s. 20, sub-s. 2, of the Finance (1909-10) Act, 1910.

Decision of Horridge J. [1913] 1 K. B. 458, affirmed.

APPEAL of the Commissioners of Inland Revenue from a decision of Horridge J. (1) upon a petition by the Commissioners

(1) [1913] 1 K. B. 458.

on appeal against the decision of a referee under s. 33, sub-s. 4, of the Finance (1909–10) Act, 1910.

James Joicey, the respondent to the petition and on the appeal, was owner in fee of certain copyhold land in the manor of Lanchester in the county of Durham; and the Ecclesiastical Commissioners as lords of the manor were owners of the minerals under the said land. The respondent had no proprietary right or interest in the minerals. By an indenture of lease dated January 30, 1873, the Ecclesiastical Commissioners granted to the South Moor Colliery Company a lease of the coal, ironstone, and fireclay under certain lands, including the land of the respondent, for a term of forty-two years from October 11, 1884.

It appeared that by the custom of the manor of Lanchester the lords of the manor and their lessees were entitled to work minerals by underground operations without the consent or authority of the copyholder provided that in so doing they did not let down or otherwise injure the surface, and that in consequence of the copyholder being entitled to support it was not possible to work more than about 50 per cent. of the coal without his licence. It was alleged by the respondent that for some considerable time previous to September, 1897, much damage had been done to the surface of his land by reason of the colliery company working the pillars of coal that ought to have been left for support; though this was denied by the appellants. Under these circumstances an indenture dated September 1, 1897, was executed between the respondent and the colliery company, whereby it was witnessed that the respondent demised to the company "full power and liberty from time to time to work get and carry away all the coal ironstone and fireclay or other minerals if any under or adjoining to the lands of the said James Joicey . . . . without leaving or making any support for the surface of the said lands of the said James Joicey or any buildings for the time being thereon To hold the said liberty unto the colliery company for all the residue unexpired of the said term of forty-two years" granted by the Ecclesiastical Commissioners, "yielding and paying unto the said James Joicey . . . . the clear rent or sum of one penny farthing for every ton

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of coals ironstone or fireclay which shall from and after the first day of July 1895 have been and shall hereafter be wrought and brought to the surface by the colliery company . . . . from and out of the mines or seams lying under the said lands of the said James Joicey such rent to be payable on the eleventh day of October in each year." The Commissioners of Inland Revenue claimed that the right granted to the colliery company under the said last-mentioned indenture was a "right to work the minerals" within the meaning of s. 20, sub-s. 2, of the Finance (1909–10) Act, 1910. (1) They assessed the rental value of that right at 500*l.* and claimed from the respondent mineral rights duty thereon of 25*l.* Upon an appeal from that assessment it was decided by the referee that the right demised by the indenture of September 1, 1897, was not a "right to work minerals" nor a "mineral wayleave" and therefore was not assessable to mineral rights duty, and that decision was upheld by Horridge J.

The Commissioners now appealed to the Court of Appeal.

Sir John Simon, S.-G., and *Finlay*, for the appellants. The mineral rights duty imposed by s. 20, sub-s. 1, of the Finance (1909–10) Act, 1910, is a percentage on "the rental value of all rights to work minerals." Sub-s. 2 defines rental value as "(*a*) where the right to work the minerals is the subject of a mining lease, the amount of rent paid." The expression mining lease is defined by s. 24 to mean "a lease for mining purposes, i.e., for searching for, mining, working, getting, making merchantable, carrying away, or disposing of mines or minerals," and s. 41 enacts that "rent" shall have the same meaning as in the Conveyancing Act, 1881, that is, it shall include tolls duties or royalties reserved by the ton or otherwise. Joicey is a

(1) By the Finance (1909-10) Act, 1910, s. 20, sub-s. 1, "There shall be charged, levied, and paid . . . . on the rental value of all rights to work minerals and of all mineral wayleaves a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling for every twenty shillings of that rental value."

Sub-s. 2: "The rental value shall be taken to be—(*a*) Where the right to work the minerals is the subject of a mining lease the amount of rent paid by the working lessee in the last working year in respect of that right."

copyholder. It is settled law that the possession of minerals under copyhold lands is in the copyholder though the property is in the lord: *Lewis* v. *Branthwaite* (1); *Eardley* v. *Granville.* (2) Therefore in the absence of custom the lord cannot get any coal without the consent of the copyholder. In the manor of Lanchester, in which Joicey's land is situate, there is a custom which allows the lord to get coal, but only so much as he can get without letting down the surface. In an unreported case of *Shafto* v. *Bolckow, Vaughan & Co., Ld. and the Ecclesiastical Commissioners* (1888) Kekewich J. held that a custom for the lords to work the minerals under the copyholds so as to let down the surface, paying compensation for the damage done, was not established. By the document dated September 1, 1897, Joicey demised to the South Moor Colliery Company the right to work the rest of the coal which they could not work under their lease from the lord and reserved a royalty per ton. That document is therefore a mining lease within the meaning of the Act, and the royalty is subject to mineral rights duty.

[BUCKLEY L.J. The position is this. The lord has the right to work all the minerals subject to the veto of the copyholder. The copyholder has no right to work, but only a power to veto the working, which of course he may release.]

That being so, in order to enable the colliery company to win all the coal they must obtain permission not only from the lessors but from the copyholder as well. There is here a bargain by the colliery company to pay to the copyholder for that permission something which is really a part of the rent in respect of the minerals. That is liable to duty. If the whole transaction were comprised in one instrument there would be no question. It cannot make any difference that it is carried out by two separate documents. By withdrawing his veto the copyholder in effect grants a "right to work the minerals." The rental value under s. 20, sub-s. 1, is measured by the rent paid for exercising the right to get the minerals.

[BUCKLEY L.J. What the copyholder gets is not rent, but the price of his veto.]

(1) (1831) 2 B. & Ad. 437. (2) (1876) 3 Ch. D. 826, 832.

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The right of the Crown to duty cannot be affected by the mere machinery by which the transaction is carried out.

[COZENS-HARDY M.R. Suppose the case of freehold land, the title to the surface being in A. and a stratum of minerals being reserved to B. subject to a covenant by B. with C. not to work the minerals for ten years. Would C.'s right of veto be subject to duty?]

It may be that it would. But that is not this case; and the case of a copyholder stands upon a peculiar footing.

Danckwerts, K.C., and *A. T. Bucknill*, for the respondent. Apart from special custom in the case of copyholds the right of property in mines is in the lord, but the copyholder has a possessory interest therein, so in the general case neither the tenant without the licence of the lord, nor the lord without the consent of the tenant, can open or work the mines. The possessory right of the tenant will suffice to sustain an action of trespass against a third person (not being the lord or his lessee) for breaking and entering the subsoil and taking coal therein, even though there be no trespass on the surface: Scriven on Copyholds, 7th ed., pp. 296, 297, where the correct view of *Lewis* v. *Branthwaite* (1) is given. That case is not a decision that the copyholder can maintain an action against the lord for taking the coal if he can do it without interfering with the surface. The lord has a right to the minerals, and the copyholder's right to possession is subject to that: *Bowser* v. *Maclean*. (2)

The only right which the surface owner has is to maintain an action on the case if his right to support is interfered with. As Lord Cranworth puts it in *Backhouse* v. *Bonomi* (3), "his right is a right to the ordinary enjoyment of his land," he has no right to "what is called the pillars or the support," i.e., to the minerals by which his surface is supported. See also MacSwinney on Mines, 4th ed., p. 290. The point is dealt with by Lord Blackburn in *Davis* v. *Treharne* (4) and by Lord Selborne in *Dalton* v. *Angus*. (5) See also *Darley Main Colliery*

(1) 2 B. & Ad. 437.
(2) (1860) 2 D. F. & J. 415.
(3) (1861) 9 H. L. C. 503, 512.
(4) (1881) 6 App. Cas. 460, 466.
(5) (1881) 6 App. Cas. 740, 790.

Co. v. *Mitchell* (1) and *West Leigh Colliery Co.* v. *Tunnicliffe & Hampson.* (2)

[KENNEDY L.J. referred to *Hext* v. *Gill.* (3)]

That was directed to surface mining, before underground working came into operation.

The question in this case is what did Joicey really do by the document of September 1, 1897. The submission is that what he did was for a consideration to waive his right to bring an action for damages for letting down the surface, or for an injunction in a quia timet action. Every instrument must be construed with reference to the circumstances under which it is executed: *River Wear Commissioners* v. *Adamson.* (4) The word "demise" in the document in question is not aptly used, because the interest conveyed is not properly the subject of demise. It is a mere incorporeal liberty. Looking at the substance of the deed it is a mere agreement to waive the right to bring an action.

[BUCKLEY L.J. Is not that a licence granted "for mining purposes"?]

It is submitted it is not. The indenture was not a lease of a right to work minerals within the meaning of s. 20. The respondent had no right in the minerals which he could demise. He had nothing but the right of support, and no right or interest in the subjacent strata.

Sects. 21 and 22 shew that what the Act is dealing with is the immediate giver of the right to work the minerals. The substance of the matter must be looked at: *Batten Pooll* v. *Kennedy* (5); *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue.* (6)

A taxing Act must be strictly construed, and in favour of the subject unless he is clearly brought within the letter of the law: *Partington* v. *Attorney-General.* (7) [They also referred to *Grey* v. *Duke of Northumberland* (8) and *Bourne* v. *Taylor.* (9)]

(1) (1886) 11 App. Cas. 127.
(2) [1908] A. C. 27.
(3) (1872) L. R. 7 Ch. 699.
(4) (1877) 2 App. Cas. 743, 763.
(5) [1907] 1 Ch. 256.
(6) (1872) L. R. 7 Ex. 211.
(7) (1869) L. R. 4 H. L. 100, 122.
(8) (1806) 13 Ves. 236.
(9) (1808) 10 East, 189.

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INLAND REVENUE COMMISSIONERS v. JOICEY (No. 2).

Apart from special custom *Hext* v. *Gill* (1) shews the surface owner's right to protection.

[COZENS-HARDY M.R. In this case we have a custom.]

The whole point is as to what is a "right to work minerals."

Sir J. Simon, S.-G., in reply. What the respondent has done in this case is to consent to the letting down of the surface for mining purposes, i.e., he has given a "right to work minerals" within the meaning of the statute.

May 8. COZENS-HARDY M.R. The question in this appeal relates to a claim for mineral rights duty in respect of what is called a rent of 1¼*d.* per ton of coals gotten under Joicey's land. The land is of copyhold tenure. Joicey is the copyholder. The Ecclesiastical Commissioners are the lords of the manor, and they have granted to a company a lease of the coal seams under Joicey's land and adjoining land.

The relative rights of the lord and the copyholder in general are well settled. The copyholder has possession not only of the surface, but of everything below the surface, including minerals. But the property in the minerals is in the lord. The result is that, in the absence of special custom, neither the lord nor the copyholder can work the minerals, but the concurrence of both is necessary. In other words, the lord cannot get that which is his property without the copyholder's consent.

Those rights may, however, be varied by special custom in the manor, but, except in so far as they are varied, the general rule prevails. There is a special custom in this manor under which the lord is entitled to work and get the minerals by underground workings, provided that in so doing he does not let down or otherwise damage the surface. This custom does not change the possession of unworked minerals, which is still in the copyholder, but the lord is entitled to deprive him of that possession, subject only to the qualification above mentioned. Practically this means that the lord can work and get, say, one half of the coal without any interference, but when it becomes desirable to remove pillars, a subsidence in the surface will be caused. The copyholder can, notwithstanding the custom, recover damages for injury to the

(1) L. R. 7 Ch. 699.

surface, or claim an injunction to prevent its recurrence. In short, while the copyholder has no right to work the minerals, he has that which amounts to a veto upon the working by the lord.

The company to whom the Ecclesiastical Commissioners have granted a mining lease, being anxious to work and get as much coal as possible, approached Joicey, and on September 1, 1897, he executed a deed in favour of the company, of which the following are the material parts. It recited Joicey's copyhold title, and that he claimed that the colliery company were not entitled so to work the coal, ironstone, and fireclay under or adjoining to his said lands as to let down or otherwise injure or interfere with the surface thereof, or the buildings for the time being thereon, and that in order to settle the said claim it had been agreed that Joicey should grant to the company such liberties as were therein contained with respect to the said lands, and by the witnessing part Joicey, so far as he lawfully could or might, thereby demised unto the company full power and liberty from time to time to work, get, and carry away all the coal, ironstone, and fireclay, or other minerals, if any, under or adjoining to Joicey's lands which might for the time being be held by the company, without leaving or making any support for the surface of Joicey's lands or any buildings for the time being thereon; yielding and paying yearly unto Joicey, his heirs, sequels in right, or assigns, the clear rent or sum of $1\frac{1}{4}d.$ for every ton wrought and brought to the surface by the company from and out of any mines or seams lying under Joicey's lands.

In these circumstances it is contended by the Crown that Joicey is liable to pay 5 per cent. on the total sum received by him from the company. The claim must be based upon s. 20 of the Finance Act, 1910. By that section the duty is imposed on "the rental value of all rights to work minerals" and the "rental value" is taken to be, "where the right to work the minerals is the subject of a mining lease, the amount of rent paid by the working lessee in respect of that right." By s. 24, "mining lease" means a lease for mining purposes, and includes an agreement for such lease; and "mining purposes" are defined to be "searching for, winning, working, getting, making merchantable, carrying away or disposing of mines and minerals."

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It seems to me that the rent paid by the company to Joicey is not paid for a right to work minerals, for it is clear that Joicey had no such right which he could confer. All he could do was to release what I have called his veto, and to allow the company without objection to work the coal in such a way that the surface might be damaged. He released his right to support from not only the subjacent but the adjacent minerals. The fact that the consideration for this release was measured by the number of tons of coal gotten from the subjacent minerals seems to me to be wholly unimportant. The case is not brought within the fair meaning of s. 20, which is a taxing section, and which ought not to be held to impose a tax upon the subject unless the words are clear.

In my opinion, Horridge J. was right in the view which he took, and the appeal must be dismissed.

BUCKLEY L.J. The minerals here in question are mines of coal underlying certain copyhold lands. The respondent James Joicey is the copyholder. According to the custom of the manor, the lord of the manor is entitled to work the minerals by underground operations without the consent or authority of the copyholder, provided that in so doing he does not let down or otherwise injure the surface. The possession of the minerals is in the copyholder in virtue of his rights in the land. The property in the minerals is in the lord. I assent to the argument which the Solicitor-General has urged before us that the copyholder is not in a position analogous to that of a mere owner of the surface. The possession of the minerals is in him, and he has all such rights as result from that state of facts. The copyholder has executed in favour of the colliery company who are working the colliery an instrument dated September 1, 1897, whereby, after reciting that the grantor claims that the colliery company are not entitled so to work as to let down or injure the surface, he grants to the colliery company liberty to work the coal under or adjoining to the copyhold lands in question without leaving or making any support for the surface in consideration of a payment to be made to him by the colliery company of what is called a rent of $1\frac{1}{4}d.$ per ton for coals gotten. The question for

decision is whether the copyholder is chargeable under s. 20 of the Finance Act, 1910, on the rental value of a right to work minerals.

If I seek to define the rights of the copyholder in respect of working these minerals, I must express it as follows: The copyholder has no right to work the minerals at all, he cannot grant that which he does not own, he can therefore confer no right to work minerals, for he has no such right himself; that which he has is a right to prevent the working of the minerals in the sense that he can claim damages for the working of the minerals if they be so worked as to let down the surface, and can maintain an action for an injunction to restrain their being so worked. He has no affirmative right to work, but holds what I may call a right of veto upon working. The lord, if he supports the surface, can take out all the minerals. The copyholder can give the lord authority to take out all the minerals, even if the result be to let down the surface. But if he gives such authority, the licence which he gives is not a grant of a right to work, but the removal of a veto against working.

Sect. 20, sub-s. 2 (*a*), uses the words "where the right to work the minerals is the subject of a mining lease," and the expression "mining lease" is by s. 24 so defined as to include a licence for mining purposes. Is the instrument of September 1, 1897, a licence for mining purposes? It is in the sense that it is a licence in aid of mining purposes of the grantee, but it is not a licence passing to the grantee any right of giving effect to mining purposes of the grantor. For the grantor can have no mining purposes. He has not in the circumstances any right to work. The better view, I think, is that a licence for mining purposes is confined to an instrument which confers upon the grantee an authority to carry into effect mining purposes which would have lain within the power of the grantor. But if I am wrong in this, and the instrument is a licence for mining purposes, then I have to read s. 20, sub-s. 2 (*a*), as if it ran "where the right to work the minerals is the subject of a licence for mining purposes." I am now assuming that the licence here in question is within those words, but I have to consider whether the subject-matter of the licence is the right to work the minerals. In my opinion it is not. The licensor had not, and could not give, any right to

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work the minerals; all he could do was to release the right of action for an injunction, or for damages, which would have lain in him if the minerals were so worked as that the surface would be or had been let down.

I may add that the instrument of September 1, 1897, is, I think, nothing more than a grant to the colliery company of liberty to do an act which, if done without such liberty, would have created in the grantor a right of action, and so that the grantee shall not be exposed to any such action. It is not irrelevant to observe that the instrument is not confined to the minerals under the copyhold land in question, but extends to adjoining lands. It was, in my opinion, nothing more than an instrument releasing the right to support.

For these reasons I am of opinion that the copyholder had not any such mineral rights as are contemplated by the section here in question, and that the yearly sum to be paid to him under the instrument is not a rent in any legal sense of the term, but only a sum calculated by reference to the amount of coal gotten, to be paid from time to time as the price of the release of the right of action which I have described. It follows that in my judgment this appeal fails and must be dismissed with costs.

KENNEDY L.J. This case has been so fully dealt with in the judgments of the Master of the Rolls and Buckley L.J. that I have little to add.

The main question is whether the instrument of September 1, 1897, entitled "Grant of liberty to work coal, ironstone, and fireclay under ancient copyhold lands at Oxhill in the county of Durham without leaving support of the surface," ought or ought not to be treated as an instrument giving to the grantee a "right to work minerals" within the meaning of s. 20, sub-s. 1, of the Finance (1909-10) Act, 1910. If it is to be so treated, the Crown is entitled under that section to a mineral rights duty of 5 per cent. upon the amount received in the year by Mr. Joicey, the grantor, under the reservation in that instrument of a yearly rent of $1\frac{1}{4}d.$ per ton of the minerals which shall be wrought and brought to the surface by the colliery company at any pit or pits of the colliery company or elsewhere, from and out of any mines

or seams lying under the copyhold lands of Mr. Joicey referred to in the instrument.

Now it is clear that Mr. Joicey, as a copyholder, had no property, in the legal sense of the term, in the minerals. He did not himself possess, and, as he did not possess, he could not grant, any right to work or deal in any way with the minerals. Further, owing to a special custom of the manor, he was not in possession of the ordinary right of a copyholder to prevent the lord of the manor from working the minerals under the copyhold lands. But he had nevertheless the right to object to the minerals being worked by the lord of the manor, or by any one else taking under him, to such an extent as would let down or otherwise damage his lands, and this meant practically that the colliery company, unless they could get Mr. Joicey's permission when working the minerals, as lessees of the Ecclesiastical Commissioners, who are the lords of the manor, would be bound to leave about 50 per cent. of the minerals unworked. This right was one of which Mr. Joicey could have availed himself either by injunction, if its invasion was threatened, or by an action for damages if it was infringed by the lessee so working the minerals as to injure Mr. Joicey's surface lands. The colliery company, therefore, who had taken a long lease from the lords of the manor, the Ecclesiastical Commissioners, entitling them, so far as the lords of the manor were concerned, to work those minerals, purchased from Mr. Joicey under the grant of September 1, 1897, for a yearly payment, Mr. Joicey's right of restraint, if I may use the phrase, upon the complete working out of the minerals under Mr. Joicey's lands; and the question, therefore, as I have already indicated, is whether what was so purchased ought or ought not to be treated as a "right to work minerals" so that the yearly sum to be paid by the colliery company to Mr. Joicey as a rental value of such a right ought to be held liable to mineral rights duty under s. 20, sub-s. 1. Speaking for myself, I do not think that the case is one which is free from difficulty. Sect. 20, sub-s. 2 (*a*), speaks of the right to work being the subject of a mining lease, and in s. 24 "mining lease" is stated to include a licence, whether by deed parol or otherwise, for "mining purposes," and "a lease for mining

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purposes" is therein stated to mean not only a lease for the purpose of "searching for, winning, working, making merchantable, carrying away or disposing of mines and minerals," but also a lease for "purposes connected therewith"; and certainly the licence from Mr. Joicey obtained by the colliery company under the instrument of September 1, 1897, is for a purpose "connected with" the working of the coal under Mr. Joicey's lands. Upon the whole, however, I have come to the conclusion that I ought to concur in the view, adverse to this appeal, which is taken by the Master of the Rolls and by Buckley L.J. Sect. 20 imposes the mineral rights duty on the rental value of "all rights to work minerals." These are the crucial and decisive words. Ought they to be interpreted, as the Crown contends, to include the privilege or licence, which is granted to the colliery company by Mr. Joicey by this instrument, of working the minerals under the grant of those minerals to the colliery company by the lords of the manor, without regard to the protection to which Mr. Joicey as copyholder is legally entitled for the support of his lands, and which, if retained by him, would have involved the colliery company in an inability to work 50 per cent. of the subjacent coal; or ought the words to be interpreted, as Mr. Joicey contends, to cover only such a right to acquire and appropriate the minerals as is given to the lessees, the colliery company, by the person in whom the property in the minerals is vested? The answer to this question appears, to my mind, to be one which cannot be given without some degree of doubt. Upon the whole, as this is a taxing Act, and the subject is entitled to require that he should not be held liable unless the language of the statute clearly establishes his liability, I have come, but not without hesitation, to the conclusion that the narrower interpretation for which Mr. Joicey contends is the one which the Court ought to uphold, and therefore that this appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Davenport, Cunliffe & Blake, for Wilsons, Ornsby, & Cadle, Durham.*

G. A. S.

[IN THE COURT OF APPEAL.]

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1913
April 22;
May 8.

COMMISSIONERS OF INLAND REVENUE *v.* EARL FITZWILLIAM.

Revenue—Reversion Duty—Determination of Lease—Total Value of Land—Licensed Premises—Value of Licence—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13; *s.* 25, *sub-ss.* 1, 3.

In estimating the total value of land for the purpose of assessing the reversion duty payable under s. 13 of the Finance (1909-10) Act, 1910, on the determination of a lease, the fact that premises on the land are licensed for the sale of intoxicating liquor, and that the value of the land is thereby enhanced, is an element to be taken into consideration.

Decision of Horridge J. [1913] 1 K. B. 184, affirmed (Buckley L.J. dissenting).

Appeal from a decision of Horridge J. (1)

The facts which had been agreed were, so far as material, as follows. By a lease dated November 7, 1861, a piece of land, together with the messuage or tenement shop and outbuildings which were then, or at any time thereafter during the term should be erected, on the premises, was demised by the then Earl Fitzwilliam (the appellant's predecessor in title) to one Jackson for a term of fifty years from April 5, 1861, at the yearly rent of 4*l.*

A messuage erected by the lessee on the land was ultimately licensed, and at the date of the expiration of the term on April 6, 1911, the lease had become, and then was, vested in a brewery company, and the house was occupied by, and the licence was in the name of, a tenant or manager of the brewery company.

After the determination of the lease Lord Fitzwilliam raised the rent to 29*l.* and rendered the necessary account for the purpose of having reversion duty (2) assessed, in which the

(1) [1913] 1 K. B. 184.

(2) Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 13:

"(1.) On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value.

"(2.) For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be

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estimated total value of the land at the date of the original grant of the lease was put at 120*l.*, which figure was accepted by the authorities. He estimated the total value of the land at the determination of the lease at 300*l.*, being on the basis of twenty years of an assumed gross rental of 15*l.* a year which the property would produce if the house was unlicensed, and the estimated value of the benefit accruing to him at the determination of the lease was put at 180*l.*, being the difference between 300*l.* and 120*l.*

It was agreed that the total value of the property at the determination of the lease, if the house was unlicensed, was 300*l.*; and that the total value of the property, including the value of the licence, was 500*l.* The licence in question was an old on-licence within the meaning of the Licensing (Consolidation) Act, 1910.

On June 8, 1911, Lord Fitzwilliam received a notice of assessment and to pay the reversion duty (Form 137, Land) in which the total value of the property was stated at the sum of 500*l.*, the total value at the date of the lease at 120*l.*, and the value of the benefit accruing to the lessor at 380*l.*, and duty amounting to 38*l.* was demanded. Lord Fitzwilliam appealed to the referee against the assessment, and he gave his decision in the following terms:—"The value of the licence to use the dwelling-house on the land in question as a public-house ought not to be included in the total value of the land, and should not therefore be

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the amount (if any) by which the total value (as defined for the purpose of the general provisions of this Part of this Act relating to valuation) of the land at the time the lease determines, subject to the deduction of any part of the total value which is attributable to any works executed or expenditure of a capital nature incurred by the lessor during the term of the lease and of all compensation payable by such lessor at the determination of the lease, exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease (including, in cases where a nominal rent only has been reserved, the value of any covenant or undertaking to erect buildings or to expend any sums upon the property), but, where the lessor is himself entitled only to a leasehold interest, the value of the benefit as so ascertained shall be reduced in proportion to the amount by which the value of his interest is less than the value of the fee simple."

considered as an element in determining the value of the land for the purpose of assessing reversion duty."

The Commissioners of Inland Revenue appealed against this decision.

Horridge J. held that, in estimating the total value of the land for the purpose of assessing the reversion duty, the fact that the premises on it were licensed for the sale of intoxicating liquor, and that the value of the land was thereby enhanced, was an element to be taken into consideration.

Lord Fitzwilliam appealed.

Sir Alfred Cripps, K.C., and *Wootten*, for the appellant. Reversion duty is a duty on land values, and the intention of the Finance (1909-10) Act, 1910, was to tax realty as distinguished from personalty. It is not denied that the expression "land" in Part I. of the Act includes buildings on the land; but neither the word "land" nor the words "total value of the land" include the value of a licence to sell intoxicating liquors. It is part of the goodwill and quite distinct from the land: *Whitley* v. *Challis*. (1) The learned judge has held that the principle of rating cases, e.g. *Cartwright* v. *Sculcoates Union* (2) and *Rex* v. *Shoreditch Assessment Committee* (3), applies, but the question here is whether goodwill arising from a licence can be taken as land. There is a clear distinction between the value of land and the value of the goodwill of a business carried on upon the land: *Cox* v. *Harper*. (4) The present question is governed by that decision rather than by the rating cases. It is not a question of what rent a hypothetical tenant would pay, but whether or not the goodwill is land. A covenant by a landowner not to allow a similar business to that carried on by one of his tenants to be conducted elsewhere on his estate would only affect the value of the tenant's business, not that of his land. The removal of licences from the premises in respect of which they were granted to other premises under ss. 24 and 26 of the Licensing (Consolidation) Act, 1910, shews that a licence is property apart from land: *Laceby* v. *Lacon & Co.* (5)

(1) [1892] 1 Ch. 64.
(2) [1900] A. C. 150.
(3) [1910] 2 K. B. 859.
(4) [1910] 1 Ch. 480.
(5) [1899] A. C. 222.

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Sir John Simon, S.-G., and *W. Finlay*, for the respondents. By s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, reversion duty is payable on the value of the benefit accruing to the lessor by reason of the determination of the lease; and by sub-s. 2 that benefit shall be deemed to be the amount by which the total value of the land at the time when the lease determines exceeds the total value of the land at the time when the lease was granted, ascertained on the basis of the rent reserved. The exemptions from reversion duty specified in s. 14 do not include licences. By s. 25, sub-s. 3, the total value of land means the gross value less certain deductions; and by sub-s. 1 the gross value of land means the amount which the fee simple if sold in the open market free from incumbrances might be expected to realize. For the purpose of reversion duty therefore the total value of the land is the market price. There is nothing about deducting anything due to licences or goodwill. Land includes the buildings on it, and if land will let for more because licensed premises have been built upon it, it is impossible to say that that is not a "benefit accruing to the lessor." By s. 25, sub-s. 2 and sub-s. 4 (*d*), in arriving at the assessable site value of land any part of the total value which is directly attributable to goodwill or any other matter which is personal to the owner or occupier is to be deducted. The absence of any similar provision in s. 13 shews clearly that for the purpose of reversion duty the value of the licence forms part of the value of the land. The effect on value is recognized in s. 44, sub-s. 2, of this Act and s. 20 of the Licensing (Consolidation) Act, 1910. The principle of the rating cases applies to reversion duty, and the appellant is not entitled to deduct from the total value of the land so much of the increase in value as is attributable to the licence: *Mersey Docks* v. *Liverpool* (1); *Cartwright* v. *Sculcoates Union* (2); *Rex* v. *Shoreditch Assessment Committee* (3), which was a case under this Act. The question is whether the premises afford peculiar facilities for carrying on a particular business, and the fact that a licence is attached to them is material. The licence does not form part

(1) (1873) L. R. 9 Q. B. 84, 97. (2) [1900] A. C. 150, 157.
(3) [1910] 2 K. B. 859, 876.

of the land, but it is an element to be considered in determining the value.

Sir Alfred Cripps, K.C., in reply.

Cur. adv. vult.

May 8. COZENS-HARDY M.R. This appeal raises an important question as to the payment of reversion duty on the determination of a long lease of property which, at the expiration of the lease, was a fully-licensed house. The facts may be shortly stated. A lease was granted in 1861 by the then Earl Fitzwilliam for a term of fifty years at the annual rent of 4*l.* The property demised was a plot of land with buildings then in course of erection. A house was built, and during the currency of the lease a full licence was granted to the occupier of the house. On the expiration of the lease Earl Fitzwilliam granted a lease for fourteen years to the then owner of the prior lease at the annual rent of 29*l.* The lease did not purport to include goodwill. It is agreed that the gross rental in 1911 if the house was unlicensed would be 15*l.*, and the total value would be 300*l.*

Reversion duty is imposed by s. 13 of the Finance (1909-10) Act, 1910, "on the value of the benefit accruing to the lessor by reason of the determination of the lease." And the value of the benefit is to be deemed to be the excess of the "total value" at the expiration over the "total value" at the time of the original grant of the lease. For this purpose the rent reserved is to be the basis of calculation. "Total value" is defined in s. 25, and for the purpose of the present case it is the same as "gross value," also defined in that section. It means the amount which the fee simple of the land, if sold in the open market by a willing seller in its then condition, might be expected to realize.

Horridge J. has held, and in my opinion has rightly held, that the increased value owing to the licence must be taken into account. I am disposed to think that the rent (29*l.*) reserved by the new lease is alone sufficient to determine the case. That rent is reserved for the house. The fee simple would fetch a price depending upon this rent. The goodwill is not demised by the lease, nor is it even mentioned in the lease. The discussion

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of the precise nature and meaning of goodwill, as applied to a public-house, seems to me irrelevant. In this very Act of Parliament, s. 44, sub-s. 2, there is a statutory recognition of the fact, which is known to everybody, that the annual value of premises as licensed premises exceeds the value the premises would bear if not licensed. And the provisions under which compensation is provided when the renewal of a licence is refused, of which compensation a part goes to the owner and part to the licence-holder, seem to me to demonstrate that the "gross value" must be increased by reason of the circumstance that there is a licence attached to the house in this sense, namely, that the licence-holder has a licence as occupier of this particular house.

The precise figures are not for our determination. The only point for our decision is this: Is the "gross value" in 1911 to be the value of the house as in fact it is, namely, a licensed house? Or is it to be the value of the house as it is not, namely, an unlicensed house?

In my opinion the judgment of Horridge J. was correct and the appeal must be dismissed.

BUCKLEY L.J. The duty in question in this case is one imposed by a section found in Part I. of the Act. That part is headed "Duties on Land Values." They are duties in each case upon land or some interest in land. The duty is levied in each case upon a sum arrived at with reference to the value of the land. The particular duty in this case is reversion duty under s. 13. On the determination of a lease of land the duty is on the value of the benefit accruing to the lessor by reason of the determination of the lease, and that value is to be deemed to be the amount by which the total value of the land at the time the lease determines exceeds the total value of the land at the time the lease was granted, to be ascertained on the basis of the rent reserved—that is to say, on the basis of the rent reserved for the land. I need not refer in detail to other provisions of the Act which shew that it is the value of the land that is the basis of the duty.

The question is whether the value of the licence (as it is called), which is taken by agreement to be 200*l.*, is part of the

value of the land. The referee held that it was not. In my opinion the referee was right.

Suppose that the freeholder of an extensive area demises a shop upon his land to a grocer and covenants with the lessee that he will not allow another grocer's shop to be opened within a certain distance of the demised premises. He will obtain a larger rent. Say that 100*l.* would have been a rack-rent without the covenant, the lessee may be willing to pay 120*l.* a year with the covenant. The additional 20*l.* a year which he pays is in these facts a payment made for the benefit of a covenant which will ensure him or may ensure him a larger trade. The capitalized value might be 500*l.* That 20*l.* a year or 500*l.* is the pecuniary value of a certain limited monopoly. The land is worth neither more nor less by reason of the existence of the covenant. The lessor obtains a larger rent, but obtains it not because the land is worth the larger sum, but because the land plus the covenant is worth more to the lessee than the land without the covenant. The lessor obtains the larger rent at the price of tying his own hands as to the manner in which he will deal with the rest of his estate.

When the licence of a public-house is said to be worth 200*l.* the true meaning is that 200*l.* is the present capitalized value of the expectation of future profit by reason of the premises being authorized according to law to be used for carrying on a certain lucrative trade. In the present case it is agreed that the total value of the property at the determination of the lease if unlicensed was 300*l.*, and including the value of the licence was 500*l.* This is equivalent to saying that the value of the land was 300*l.* and the capitalized value of the benefit of the authorized trade was 200*l.* To attribute the whole 500*l.* to the value of the land is, with all deference to those who think otherwise, to confuse two things which are distinct, namely, the value of the land and the value of the authorized trade which can be carried on upon the land. The statute, I think, taxes the former but not the latter.

When the lease determined the land comprised the site and the building upon it, and that building enjoyed the opportunity of making such profits as would accrue from carrying on upon

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the land the business of a publican, authorized, as it was, by the licence. The present value of the expectation of profit was 200*l.* That sum represented the enhanced value of the business to be carried on upon the land, authorized, as it was, by the licence. The licence was not goodwill, but was something without which the goodwill of a public-house could not be created. The licence was not part of the land. The licence might be forfeited or surrendered or removed, and notwithstanding any of those things, the land—that is to say, the site—and the buildings would remain. The 500*l.* is in fact the value of the land plus the present value of the expectation of making profit by reason of the authority given by the licence to carry on the business of a publican on the land. The Solicitor-General pointed attention to s. 25, sub-s. 4 (*d*), of the Act, which speaks of some part of the total value of land being proved to be directly attributable to goodwill or any other matter which is personal to the owner, and sought to argue from this that goodwill formed some part of the total value of the land. To my mind those words lead to a contrary conclusion. If part of the total value of the land is attributable to goodwill or something personal to the owner, that must be because the goodwill, or that personal thing, is external to the land, and is a causa causans which may increase the value of the land although the goodwill, or personal thing, itself forms no part of the land. A licence, however, is not goodwill. It is an authority to carry on a lucrative business, with the result that a valuable goodwill may be created. Then it was said that, if the case were one of rating, the enhanced value of the premises by reason of the existence of the licence would be a subject-matter in determining rateable value. This is true. But in rating the question is what rent the hypothetical tenant would pay for the premises enjoying, as they do, a particular advantage. The rent, of course, will be enhanced by the fact that the tenant is, by reason of the existence of the licence (or in the case which I put by way of illustration the existence of the covenant), in a position to acquire larger profits. This induces him to pay a higher rent.

In the rating cases the man pays the higher rent for the benefit of the occupation of the land and the benefit of the

enjoyment of the licence, and as rent is the basis for rating, the pecuniary benefit of the licence comes into account. Under some circumstances profits are an essential element in rating, as, for instance, in the case of a railway. "It is a mistake to suppose that valuation by rental is a process dissociated from the idea of profit." (Lord Watson in *Edinburgh Street Tramways Co.* v. *Lord Provost of Edinburgh.*(1))

This is not so when the subject-matter to be determined is the value of the land as land. To such extent as the premises may have been rendered more valuable by being fitted up for a particular trade, as, for instance, in the present case by being rendered structurally useful and attractive, that is, no doubt, an element to be brought into account. But the licence, that is to say, the authority to use the land for certain profitable purposes, is no part of the land, and its value is not included in the value of the land. For these reasons I think that the order under appeal is erroneous and the decision of the referee was right.

KENNEDY L.J. On April 6, 1911, a lease for the term of fifty years of certain premises which had been granted by the predecessor in title of Lord Fitzwilliam, who is the appellant in this Court, was determined by effluxion of time. It is undisputed that those premises, consisting at that time of land with a building thereon, constituted "land" within the meaning of the sections of the Finance (1909-10) Act, 1910, relating to reversion duty. By the express terms of s. 13, sub-s. 1, of that Act, "On the determination of any lease of land there shall be charged, levied, and paid, subject to the provisions of this Part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease, a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

By the terms (so far as they are material) of sub-s. 2 of the same section, it is provided that the value of the benefit accruing to the lessor shall be deemed to be the amount, if any, by which the total value, as defined by s. 25, of the land at the time the lease determines, subject to certain deductions which are, for the

(1) [1894] A. C. 456, 475.

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purpose of this case, immaterial, exceeds the total value of the land at the time of the original grant of the lease; and it is further expressly provided that the last named value is to be ascertained on the basis of the rent reserved and payments made in consideration of the lease.

In s. 25 the meaning of the expressions "total value of land" and "gross value of land" are stated, and it is agreed that the total value, for the purpose of applying the provisions of s. 13 to the facts of the present case, in no way differs from that which, in the same 25th section, is described as "gross value," i.e., the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances and from any burden, charge, or restriction (other than rates and taxes), might be expected to realize.

All the land applicable to the present case is comprised within these very few and, as I venture to think, fairly plain and intelligible enactments by the Finance (1909-10) Act, 1910.

The material facts are simple. The annual rent of the land in question reserved by the fifty years lease which expired in April, 1911, was a sum of 4*l.* Between the date of the commencement of the lease and the date of its determination the premises now upon it were erected, and a licence for the sale of intoxicating liquors—an "old on-licence" within the meaning of the Licensing (Consolidation) Act, 1910—was obtained by the lessee in respect of these premises, and they were at the date of the determination of the lease licensed premises, and were relet to the tenant by Lord Fitzwilliam as such at the greatly enhanced rent of 29*l.* It is agreed that (1.) the value of the property at the time of the original grant of the old lease, if calculated in obedience to s. 13, sub-s. 2, upon the basis of the rent reserved in the lease, was 120*l.*; (2.) that the value of the property, if valued at the time of the termination of that lease as unlicensed, was 300*l.*, and if valued as licensed was 500*l.* The difference between the two sums—200*l.*—represents the subject-matter of the dispute between the appellant and the respondents on this appeal, the contention of the appellant being that, in calculating under s. 13 the value of the benefit which has accrued to him by reason of the determination of the lease, that portion of the

value of the property which springs from its now being licensed property ought to be excluded from consideration. Horridge J., who pronounced the judgment under appeal, rejected this contention, and I think that he was right in doing so. It is, upon the face of it, a somewhat startling contention. It invites the Court, as the Master of the Rolls pithily, but with absolute accuracy in my view, has put it, to hold that this land—which, as I have said, includes in the view of this statute the building upon it—ought to be valued not as it in fact is, licensed property, but as unlicensed property, which in fact it is not. But let us look at the matter more closely. "Total value" under s. 25 is the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, might be expected to realize. It is the fact that this total value is 500*l.* Why is the buyer willing to give 500*l.* and not only 300*l.*? Because, in his eyes, the property to which such a licence attaches is worth 200*l.* more than the same property without such a licence. If, according to the measure of total value prescribed by s. 25, the total value is 500*l.*, why should 300*l.* be taken as the sum with which the value of the property at the date of the commencement of the expired lease—120*l.*—is to be compared in order to arrive at the amount upon which the reversion duty is to be charged under s. 13? If I follow correctly the arguments put forward in this Court and in the Court below, it is said by the appellant that the element which the buyer from Lord Fitzwilliam recognizes in the price which he is willing to give in the open market for this property ought not to be considered in valuing this property, because the licence is a personal grant to the licensee; it is a part of the goodwill of the business; it is not like goodness of site, a fixed or permanent element of value, but one that may be lost by the forfeiture of the licence or by its non-renewal through one or other of the causes which existing legislation sanctions as causes for the non-renewal of "old on-licences." I find myself unable to accept this reasoning. The licence is in form a grant to a person who thereby becomes for the time the holder of the licence; but the grant is made to him only in respect of the particular premises. It is really attached to those premises. It is not, as the goodwill of a business may be, a separately saleable thing.

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It cannot be transferred to other premises without the authority of the magistrates and the consent of the owner of the premises in respect of which it was granted. If the licence is extinguished under the provisions of the Licensing Act, 1910, then under s. 20 of that Act, in the case of an "old on-licence" (such as belongs to the premises in the present case), "a sum equal to the difference between the value of the licensed premises . . . . and the value which those premises would bear if they were not licensed premises" (I am quoting from the Act) "shall be paid as compensation to the persons interested in the licensed premises." In s. 44, sub-s. 2, of the Finance Act, 1910,—the Act under which the question which we are considering arises—wherein provision is made for the valuation of licensed premises for the purpose of calculating duties on liquor licences, we read "the annual licence value shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises." The element of value created by the grant of such a licence as was granted in respect of the premises under consideration in the present case during the continuance of the lease is, in my humble judgment, characteristically different from the temporary element of value created by a lessor's covenant in favour of his tenant in regard to restriction upon the use, in competition with the tenant, of adjoining property. That covenant is a personal covenant, which dies with the lease which granted it. The "old on-licence" does not die. It continues to give an enhanced value to the premises in the lessor's hands, though the lessee's interest has expired. And under s. 13 it is the value of the property in the owner's hands at the date of the determination of the lease which has to be ascertained.

Nor is the licence, as I think, in any true sense a part of the goodwill of the publican's business. Its existence is essential, no doubt, to the creation of such a goodwill because the business of the sale of intoxicants cannot lawfully be carried on without a licence. Other connection between the licence and the goodwill of the publican's business there is, so far as I can see, none.

Lastly, in regard to the objection that the existence of the licence as an element of value is not entirely permanent (and

in regard to this it is to be remembered that, in respect to the "old on-licence," the owner is compensated if the renewal of the licence is refused for other than certain specified causes against which the owner may to a very large extent protect himself), it appears to me that the possibility of the extinction of the licence is, like the durability of the structure or the continuance of the value of the site for the particular trade, a matter which the prudent buyer in the market will take into consideration in fixing the price which he will offer for the premises. For example, if such licences were permanently attached to premises in respect of which they have been granted, the buyer of these licensed premises would, no doubt, be willing to pay not merely 500*l.*, but a good deal more. The risk of the discontinuance of the licence is a circumstance which pro tanto affects unfavourably the value of the premises to which it is attached. But it cannot, as I venture to think, operate to take out of the consideration of their total value "in its then condition" the fact that they are premises to which for the time a licence is attached. In my humble judgment, no sufficient reason has been adduced by the appellant in this Court for refusing to recognize the existence of the licence as an element of value in property under s. 13 just as it is recognized in the valuation of licensed property under the law of rating, in the assessment of compensation under the licensing laws, and as in practice it is universally recognized in the property market. The unreality of the appellant's case appears to me to be illustrated by his own statement appearing in the petition. He claims that the total value of the land should be put at 300*l.* upon the basis of a gross yearly rental of 15*l.*, being the rental which would be obtained if the property was unlicensed. In fact for the property as licensed, as it was when the old lease determined (and that is the time you have to consider), he has obtained a tenant at a gross yearly rental of 29*l.*

I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *C. E. Pullon, for H. W. & R. Pearson & Russell, Malton; Solicitor of Inland Revenue.*

H. C. R.

C. A.
1913
April 29, 30;
May 8.

[IN THE COURT OF APPEAL.]

THE ATTORNEY-GENERAL *v.* MILNE AND ANOTHER.

Revenue—Settlement Estate Duty—Property deemed to pass on Death—Settlement not in Consideration of Money or Money's Worth—Death of Settlor within Three Years—Property passing "under that disposition on the death of the deceased"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 5.

By s. 1 of the Finance Act, 1894, estate duty is leviable upon the principal value of all property, settled or not settled, which passes on the death of the deceased.

By s. 2, sub-s. 1, "Property passing on the death of the deceased shall be deemed to include," (*c*) property which would be required on the death of the deceased to be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, if those sections were therein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" were omitted therefrom.

By s. 5, "(1.) Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property," a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied.

By a deed, which was made in consideration of natural love and affection, the owner of certain property settled it upon his son for life with remainders over. The settlor died within three years after the execution of the deed. The property came within the class referred to in s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, and estate duty was paid in respect thereof upon the death of the settlor. The Crown also claimed settlement estate duty under s. 5:—

Held, that the property comprised in the deed passed on the execution of the deed and not "at the death of the deceased"; the words of s. 5, sub-s. 1, must be taken in their natural sense and not as referring to a notional passing under s. 2, sub-s. 1. Therefore settlement estate duty was not payable.

Decision of Horridge J. [1913] 1 K. B. 337, reversed.

THIS was an information by the Attorney-General claiming settlement estate duty. The facts stated in the information and admitted by the defendants were as follows. By a voluntary settlement dated May 20, 1909, Henry Ernest Milne, since deceased, assigned certain stocks and shares to trustees upon trust to retain or reinvest the same as therein mentioned, and pay the income to his son, John Rothwell Milne, during his life

or until bankruptcy or alienation, with the usual discretionary trust during the remainder of John Rothwell Milne's life, and after his death in trust for his children or issue as therein mentioned, and in default of issue in trust for such persons as John Rothwell Milne should appoint, and in default of appointment in trust for his five sisters.

The settlor Henry Ernest Milne died on December 8, 1911, within three years from the date of the settlement. It was admitted that estate duty was payable on his death under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. The value of the property in the settlement was assessed for the purposes of estate duty at 3980*l.* 6*s.*, and the defendants, the trustees, paid 278*l.* 12*s.* 5*d.* for estate duty. The Attorney-General claimed that settlement estate duty was also payable under s. 5, sub-s. 1, of the same Act. (1) The defendants contended that it was not payable.

Danckwerts, K.C., and *Harman*, for the appellants. Settlement estate duty is not payable on this property. It did not pass on

(1) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 1: "In the case of every person dying after the commencement of this Part of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'Estate duty,' at the graduated rates hereinafter mentioned . . . ."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

. . . . .

"(*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words 'voluntary' and 'voluntarily' and a reference to a 'volunteer' were omitted therefrom . . . ."

Sect. 5: "(1.) Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(*a*) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate hereinafter specified . . . ."

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the death of the deceased, although for the purpose of estate duty it is, by s. 2, sub-s. 1, of the Finance Act, 1894, deemed to have passed at that time, and under s. 2, sub-s. 1 (*c*), would be included in an account under s. 38 of the Customs and Inland Revenue Act, 1881, and would be subject to estate duty. Settlement estate duty was granted by s. 5, sub-s. 1, of that Act, "where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property." This property was not settled by the will of the deceased, and, although settled by another disposition, it did not in any way pass at his death. It was an immediate gift inter vivos. In *Attorney-General* v. *Chamberlain* (1) this question was passed over in silence.

In *Attorney-General* v. *Smyth* (2) it was held that property was subject to settlement estate duty because it was liable to estate duty, but that reasoning is obviously mistaken; there is nothing in the Act to that effect. The Crown will rely on *Lord Advocate* v. *Heywood-Lonsdale's Trustees* (3) and *Inland Revenue* v. *Heywood-Lonsdale's Trustees* (4), but the conditions which existed in those cases are wanting here.

Sir John Simon, S.-G., and *Tomlin*, for the Crown. The first part of the Act deals with estate duty and must be read as a whole. Settlement estate duty comes within s. 2, which is not limited to estate duty. It applies to other things, for instance to the calculation of the aggregate under s. 4. This property must therefore be deemed to have passed under a disposition on the death of the deceased within s. 5, sub-s. 1. It passed within three years and must be included in the account and is liable to estate duty. It passed "under that disposition," for those words were only inserted to identify the property.

Sect. 2 and its sub-sections make an exhaustive catalogue of everything which for the purposes of the Act is to be treated as passing under the Act. The words "under that disposition" cause no difficulty; they must be construed to mean passes under

(1) (1904) 90 L. T. 581.
(2) [1905] 2 I. R. 553.
(3) (1906) 43 Sc. L. R. 529.
(4) (1906) 43 Sc. L. R. 589.

the transaction of settlement which gives rise to the notional passing.

Danckwerts, K.C., in reply. *Earl Cowley* v. *Commissioners of Inland Revenue* (1), *Winans* v. *Attorney-General* (2), and *Attorney-General* v. *Dodington* (3), which was approved in the House of Lords in *Commissioners of Inland Revenue* v. *Priestley* (4), shew that s. 2, sub-s. 1, is not like a definition clause to be applied to every case in which the words "pass at the death" are used, but is a clause making subject to duty certain specific classes of property which do not in fact actually pass on the death.

Cur. adv. vult.

May 8. COZENS-HARDY M.R. The question in this appeal is whether settlement estate duty is payable in respect of property comprised in a voluntary settlement executed less than three years before the death of the settlor. The settlement was a voluntary deed under which the settlor retained no benefit, the trust being for his son (who survived him) for life and other persons after his death. On the settlor's death estate duty was admittedly leviable under s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, and it is contended by the Crown that the effect of s. 5 is to make the settled property subject to settlement estate duty. This depends upon a somewhat minute examination of the language of s. 5, sub-s. 1, "Where property in respect of which estate duty is leviable" (which admittedly applies to the present case) "is settled by the will of the deceased," (which does not apply to the present case) "or having been settled by some other disposition passes under that disposition on the death of the deceased to some other person not competent to dispose of the property," then a further estate duty, called settlement estate duty, is payable. Can it be said that there was any disposition by which this property passed on the death of the deceased to some person not competent to dispose of it? In my opinion it can not. The property passed under the voluntary settlement, and at the moment of its execution, and not at the death of the settlor, it

(1) [1899] A. C. 198.
(2) [1910] A. C. 27.
(3) [1897] 2 Q. B. 373, 384.
(4) [1901] A. C. 208, 216.

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passed to a person not competent to dispose of it. The words of the section seem to me not to justify the interpretation put upon them by the Crown. The words are amply sufficient, and in all respects accurate, if applied to a case in which the settlor settles reserving a first life interest to himself with subsequent life interests over. In that case the property passes on the death of the settlor. I have not forgotten that this settled property, though it did not in fact pass on the death of the settlor, is deemed to be included in property so passing, but that does not seem to me to remove the difficulty in the way of the Crown.

The point raised before us cannot be said to have been argued and decided in England. In *Attorney-General* v. *Chamberlain* (1) it seems to have been assumed without argument, and the judgment of Channell J. does not allude to the point. In Ireland, in the case of *Attorney-General* v. *Smyth* (2), the facts were for the present purpose identical with the facts of this case, and it was held that estate duty was payable, and Palles C.B. says: "Upon the whole case I have arrived at the clear conclusion that the property comprised in the settlement is liable to estate duty, therefore to settlement estate duty." That is all he said on the point. In Scotland, in the case of *Inland Revenue* v. *Heywood-Lonsdale's Trustees* (3), the Lord Ordinary held that settlement estate duty was payable, relying, apparently, upon the consideration that any other interpretation would impose a hardship upon the other beneficiaries under the settlement by depriving them of the advantage which the payment of estate duty confers, but I confess my inability to follow the argument. With great respect to Horridge J., I am unable to accept his view that settlement estate duty is payable. In my opinion the appeal should be allowed.

BUCKLEY L.J. Henry Ernest Milne died on December 8, 1911. On May 20, 1909, within three years, therefore, of his death, he disposed of the property here in question by way of settlement under which his son John Rothwell Milne, who survived him, was tenant for life. The question is whether settlement estate

(1) 90 L. T. 581. (2) [1905] 2 I. R. 553.
(3) 43 Sc. L. R. 589.

duty became on the death of Henry Ernest Milne payable in respect of the settled property.

Inasmuch as the property was disposed of within three years of the death it was to be deemed within s. 2, sub-s. 1 (*c*), of the Finance Act, 1894, to have passed on the death of the deceased, and became liable to estate duty. The first words, therefore, of s. 5, sub-s. 1, are satisfied in that this was property in respect of which estate duty is leviable. It was further property settled by a disposition other than the will of the deceased, and it passed to a person not competent to dispose of it in that it passed to the son as a limited owner as tenant for life. So far there is no difficulty. The Crown argue further that it passed under the settlement on the death of the deceased. As matter of plain language it obviously did not. It passed under the settlement on May 20, 1909, when the settlement was executed, and not when the settlor died some two and a half years later. The question seems so plain that any further judgment upon it would seem unnecessary.

We have, however, listened to an argument exceedingly interesting, exceedingly ingenious, and so subtle as that it has required all the skill of the advocate to make it even intelligible. Its object was to shew that the words of the statute do not mean what they say. Even if that argument were well founded, as I think it is not, it would be contrary to true principles of construction of a taxing Act to say that the subject is taxed unless the tax is found imposed by plain language. I hope I do no injustice to the argument if I say that it assumes the following form. Under this Act of Parliament there is a notional passing of property. Property which in fact passed within three years before the death is notionally to be deemed to be, and is spoken of as, property passing on the death. It is said that the verb "passes" in s. 5, sub-s. 1, must be understood to mean "notionally passes" and that the words "under that disposition" mean that the act which set in motion that notional passing of the property was the execution of the instrument within three years of the death; that the disposition referred to, therefore, must be a disposition by the deceased, and that the section is to be read as if the words were "having been settled by some other

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disposition made by the deceased notionally passes (by reason of his having executed that disposition) on the death of the deceased." To my mind this is doing most extraordinary violence to the language of the Act of Parliament, and any considerations which might have been admissible for the purpose of leading to that result ought not to be entertained in construing a taxing statute. This property was settled by a disposition and passed under that disposition not on the death of the deceased, but on May 20, 1909, when that disposition was executed.

Under these circumstances it is not within the property upon which the Act has charged settlement estate duty. The appeal, therefore, must, in my judgment, be allowed.

KENNEDY L.J. This is an appeal against the judgment of Horridge J. whereby it was declared that upon the death of Henry Ernest Milne (who died on December 8, 1911) settlement estate duty became payable upon the principal value of the property mentioned or comprised in an indenture of settlement of May 20, 1909.

The liability depends upon the applicability to this case of s. 5 of the Finance Act, 1894. That section enacts that settlement estate duty is leviable "where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property."

In the present case there is no doubt that estate duty is leviable in respect of the property comprised in the settlement, a settlement not made by will, but by an indenture whereby the settlor, Henry Ernest Milne, on May 20, 1909, rather more than two years before his death, disposed of the property in question. There is also no doubt that by virtue of that indenture the property passed to a person not competent to dispose of the property. It passed to the son of the settlor as tenant for life. It did not pass under that disposition on the death of the deceased, but, as I have said, rather more than two years before the death of the deceased. Therefore, as it appears to me, inasmuch

as it did not pass under that disposition upon the death of the settlor, the facts do not bring the case within the operation of s. 5 according to the natural and apparent meaning of the language of that section.

It is, however, contended on behalf of the Crown, and it is the view which has been adopted by the learned judge in the Court below, that the section is not to be read in its natural sense; that the words "passing . . . . on the death of the deceased" include what was called in the argument before us a "notional passing" under the provisions of s. 2, sub-s. 1 (*c*); and that the words "under that disposition" ought to be treated simply as identifying the property to be dealt with and the document under which the title is acquired; or, in other words, that a settlement by an instrument inter vivos, such as the settlement of May 20, 1909, whereby the property passed upon the execution of the indenture of settlement and before the death of the deceased and in respect of which estate duty became payable by virtue of s. 2, sub-s. 1 (*c*), comes within the scope of s. 5.

There are, no doubt, cases, referred to in the judgment of Horridge J., in which such a view seems to have been adopted or assumed as the true view without argument, and there is a Scotch case, also referred to by the learned judge, which may fairly be regarded as a decision in favour of the same view. But, in my judgment, it cannot be adopted without doing violence to the language of s. 5 to an extent which nothing short of the inability otherwise to give a meaning to the language could be held to justify. Read in their natural sense, the words express an intelligible enactment, and that enactment is not one which would give the Crown a right to the payment of settlement estate duty in the present case.

I think therefore that this appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Rooke & Sons.*

J. R. B.

C. A.
1913
April 15, 16.

[IN THE COURT OF APPEAL.]

NATIONAL TELEPHONE COMPANY, LIMITED *v.* HIS MAJESTY'S POSTMASTER-GENERAL.

Practice—Railway and Canal Commission—Reference—Arbitration—Telephone—Appeal—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *s.* 17, *sub-s.* 2—*Telegraph (Arbitration) Act*, 1909 (9 *Edw.* 7, *c.* 20), *ss.* 1 *and* 2.

Commissioners were established by the Railway and Canal Traffic Act, 1888, by s. 17 of which an appeal lies from their decision on points of law to the Court of Appeal. By s. 1 of the Telegraph (Arbitration) Act, 1909, any difference between the Postmaster-General and any body or person under any agreement relating to telephones shall, if the parties agree, be referred to the Railway and Canal Commission, and that Commission shall determine the same. By s. 2, all such proceedings are to be conducted by the Commission in the same manner as any other proceeding is conducted by them under the Railway and Canal Traffic Acts, 1873 and 1888, and any order of the Commission on any such difference shall be enforceable as any other order of the Commission, provided (1.) that any matter of difference may be determined by the two Commissioners, and (2.) the costs shall be in the discretion of the Commission.

In 1905 agreements were made whereby the National Telephone Company were to sell all their plant to the Postmaster-General and matters of difference were to be referred to the Court of the Railway and Canal Commission. In February, 1912, the company applied to the Commission to settle the amount of the purchase-money; and in January, 1913, the Court did "order and determine" that 12,515,264*l.* was the total amount:—

Held, Buckley L.J. dissenting, that the Commissioners were sitting as a Court of record and not as arbitrators, and that an appeal from their decision could be brought to the Court of Appeal.

Appeal from a decision of the Railway and Canal Commissioners.

By an agreement of February 2, 1905, made between the Postmaster-General, on behalf of His Majesty King Edward VII., and the National Telephone Company, Limited, amended by a supplemental agreement between the same parties dated August 8, 1905, it was agreed that the Postmaster-General should buy and the company should sell all the company's plant in use by the company on December 31, 1911. By clause 4 of the supplemental agreement it was agreed that all matters of

difference under that clause should be referred to arbitration. By clause 15 of the principal agreement all such matters of difference so referred to arbitration were referred to the Court of the Railway and Canal Commission if authorized to entertain the same. By the Telegraph (Arbitration) Act, 1909 (9 Edw. 7, c. 20), it was enacted that: "Sect. 1. Any difference between the Postmaster-General and any body or person under the Telegraph Acts, 1863 to 1908, or under any licence or agreement relating to telegraphs (including telephones), shall, if the parties to such difference have before the passing of this Act agreed, or hereafter agree, to such reference, be referred to the Railway and Canal Commission, and that Commission shall determine the same. Sect. 2. All proceedings relating to any difference directed to be determined by the Railway and Canal Commission under this Act shall be conducted by the Commission in the same manner as any other proceeding is conducted by them under the Railway and Canal Traffic Acts, 1873 and 1888, or any Act amending the same, and any order of the Commission on any such difference or question shall be enforceable as any other order of the Commission: Provided—(1.) that any matter of difference or any question arising before the Commission under this Act may, in the discretion of the Commission and with the consent of the parties, be heard and determined by the two appointed Commissioners, whose order shall be deemed to be the order of the Commission; and (2.) that the costs of every proceeding before the Commission shall be in the discretion of the Commission."

On February 9, 1912, the company filed an application in the Railway and Canal Commission Court stating that differences had arisen with respect to the value of the company's plant, and applied to that Court to settle the amount of the purchase-money. On May 14 the Postmaster-General filed his answer, and on January 31, 1913, the Court did "order and determine" that 12,515,264*l.* was the total amount of the several values to be determined as the subject-matter of the "reference" to the Court, and ordered the Postmaster-General to pay the costs of the reference and the inquiry thereunder.

The Postmaster-General appealed to the Court of Appeal and asked that so much of the judgment of the Court of the Railway

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and Canal Commission as decided that in determining the value of the plant the Court might take into consideration (*a*) the cost of raising a sufficient amount of capital to pay for the construction of the company's plant and (*b*) any part of the cost of the company of inducing persons to agree with the company for the supply to them of a telephonic service and for the installation upon their premises of telephonic plant for the purpose of supplying such service might be reversed.

The company served a cross-notice of appeal and asked that the matter should be remitted to the Court of the Railway and Canal Commission with directions upon various grounds to increase the amount of the values, and they took the preliminary objection that the case had been heard by the Commission as arbitrators and that an appeal to the Court of Appeal would not lie.

By s. 17, sub-s. 2, of the Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), "save as otherwise provided by this Act, an appeal shall lie from the Commissioners to a superior Court of Appeal." By s. 55 "superior Court of Appeal means, as regards England, Her Majesty's Court of Appeal."

Sir Rufus Isaacs, A.-G., Sir John Simon, S.-G., Buckmaster, K.C., W. G. S. Schwabe, and *G. A. H. Branson,* for the appellant.

Sir A. Cripps, K.C., Danckwerts, K.C., E. Forbes Lankester, K.C., E. Morten, K.C., H. H. Gaine, and *Aubrey T. Lawrence,* for the company. There is the preliminary objection that this Court has no jurisdiction to entertain the appeal. It is an appeal from an award made by arbitrators; the objection can be taken now: *Norwich Corporation* v. *Norwich Electric Tramways Co., Ld.* (1); and the only right of appeal is by a case stated by the arbitrators for the opinion of the High Court: Arbitration Act, 1889, s. 19; *Tabernacle Permanent Building Society* v. *Knight.* (2) The right of appeal from a decision of the Commissioners to this Court given by s. 17, sub-s. 2, of the Railway and Canal Traffic Act, 1888, applies only to their decisions as a Court of record, not to cases which they hear as arbitrators. The present Court of Commissioners was

(1) [1906] 2 K. B. 119. (2) [1892] A. C. 298.

established by that Act, which repealed the greater part of the Railway and Canal Traffic Act, 1873, and by s. 2 it is a Court of record. There is nothing in the Act of 1888 which gives the Commissioners jurisdiction in the present case. By the Telegraph (Arbitration) Act, 1909, s. 1, differences between the Postmaster-General and any body or person relating to telephones shall, if the parties agree, and only in that case, be referred to the Commission for determination. By s. 2 all such proceedings are to be conducted by the Commission in the same manner as any other proceeding is conducted by them under the Railway and Canal Traffic Acts, 1873 and 1888, and any order of the Commission is to be similarly enforceable. By s. 2, sub-s. 1, any question may in the discretion of the Commission and with the consent of the parties be heard before two Commissioners; and by sub-s. 2 costs are in the discretion of the Commission. The fact that these provisions are necessary shews that the Commission are sitting as arbitrators. The Act is intituled the "Arbitration" Act, and s. 2, sub-s. 2, would be unnecessary if all the Commission's powers applied to references under s. 1. Therefore no right of appeal is given; and the appellants can only contend that a right to appeal is given by implication. A right to appeal is not a question of procedure; it is a positive right and cannot be given by implication. It must be expressly granted by statute: *Attorney-General* v. *Sillem*(1); *Colonial Sugar Refining Co.* v. *Irving*(2); *Rex* v. *Hanson*(3); *Reg.* v. *Stock.*(4) Sect. 2 of the Act of 1909 only refers to procedure before the Commission; it confers no right of appeal.

Sir Rufus Isaacs, A.-G., Sir John Simon, S.-G., Buckmaster, K.C., W. G. S. Schwabe, and *G. A. H. Branson,* for the Postmaster-General. By the Act of 1909 all the incidents of the Commission are brought into operation, provided the parties agree to refer their differences to them. Those incidents include the right of appeal under s. 17 of the Act of 1888, which, on questions of law, is in general terms, and the parties are in a similar position to that occupied by railway companies under that Act. This is a question of the true construction of the Act of 1909. It contains

(1) (1864) 10 H. L. C. 704, 724.
(2) [1905] A. C. 369.
(3) (1821) 4 B. & Ald. 519.
(4) (1838) 8 Ad. & E. 405.

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nothing to deprive us of the right to appeal. The Commission have no option; they must hear the case if the parties agree to their jurisdiction; and in that case the proviso to s. 2 of the Act of 1909 shews that all the incidents of their ordinary jurisdiction apply. This is an exercise of their proper jurisdiction, not an arbitration: *North Eastern Ry. Co.* v. *North British Ry. Co.* (1) It was necessary to provide in s. 2 of the Act of 1909 that orders of the Commission should be enforceable as any other of their orders so as to obviate any question arising from the matter being determined by two Commissioners only, and to give them a discretion as to costs. It is practically a copy of s. 4 of the Conveyance of Mails Act, 1893. The Commission is a well-known body established as a Court by the Act of 1888, and these matters are referred to them as a Court, not as arbitrators.

Sir A. Cripps, K.C., replied.

COZENS-HARDY M.R. A preliminary objection has been taken that no appeal lies from a decision of the Railway and Canal Commissioners acting under the Telegraph (Arbitration) Act, 1909. It is not possible to understand the true effect of that Act without considering the earlier legislation relating to the Commissioners. They are a body constituted under the Act of 1888. They are made a Court of record. They have powers and duties wider than those possessed by their predecessors under the Act of 1873. They are not mere arbitrators. A right of appeal is given by s. 17, and it has been held by the Court of Session in *North Eastern Ry. Co.* v. *North British Ry. Co.* (1) that under that section an appeal lies from an order made in a matter arising under s. 8 of the Act of 1873 which is, by consent, referred to the Commissioners for their decision "in lieu of being referred to arbitration." The quorum of the Commissioners under the Act of 1888 on the hearing of any case is three, and under s. 2 of the Railway and Canal Traffic Act of 1894 they have only a limited power of awarding costs. By clause 15 of what is known as the purchase agreement between the Postmaster-General and the National Telephone Company, all questions and matters of difference were to be referred to the

(1) (1897) 10 Ry. & Ca. Tr. Cas. 82.

Railway and Canal Commission, if that body should be authorized to entertain them. The Act of 1909 conferred the power and imposed the duty upon the Commission. [His Lordship read ss. 1 and 2.] In my opinion the matter comes before the Commission as a Court, and not before the Commissioners as arbitrators. The decision arrived at is not an award by the Commissioners as arbitrators, but is an order of the Court and falls within the express terms of s. 17 of the Act of 1888. It is, however, urged that s. 2 shews that this is a special and peculiar jurisdiction, distinct from the general jurisdiction, and that the first part of s. 2 is unnecessary, except in this view. I am unable to assent to this argument. The section makes two exceptions from the general provisions, namely, it alters the quorum in a certain event, and the power to award costs. The section is not very artistically framed, but I think it means that the proceedings of the Court under the Act of 1909 are to be identical with proceedings under the earlier Acts except in the two specified particulars.

In my opinion the preliminary objection cannot be sustained; we have jurisdiction to hear and decide the appeals, which, I assume, raise questions of law and not mere questions of fact.

BUCKLEY L.J. I am unable to agree with the conclusions at which the Master of the Rolls has arrived. In my opinion, the preliminary objection prevails, and this appeal does not lie.

The question arises upon the true construction of the Act of 1909. As I read that Act, the first section is one which throws upon the Railway and Canal Commission the duty of acting as contractual arbitrators if the parties to a difference have agreed to refer to them. The effect of that section is that their power arises from the consent of the parties; their duty arises by the operation of the statute. Unless the parties agree to refer to them and there arises that which the section calls a reference, the Commission have no power at all. They acquire their power by the consent of the parties. When they have the power, then the statute imposes upon them the duty of determining the matter. Their power in this case arose under the agreement of 1905. Their duty arose under the Act of 1909.

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I point further to the fact which has some bearing possibly upon the matter that by s. 4 the short title of this Act is "The Telegraph (Arbitration) Act, 1909."

The conclusion thus arrived at from ss. 1 and 4 is to my mind strongly fortified by reading s. 2. If the other construction, that which the Master of the Rolls thinks is right, is adopted, s. 2 is unnecessary and otiose and has no effect in three particulars; it has effect I agree in one. It is otiose in providing that a proceeding relating to this difference shall be conducted by the Commission in the same manner as any other proceeding is conducted by them. If it be the fact that this is before them as a Court, of course they will conduct it in the same way as they conduct other proceedings in their Court; s. 2 was not wanted to say so. Further, it is otiose in providing that their order shall be enforceable as any other order of the Commission. That points to there being some difference between this order and another order of the Commission sitting as a Court. It suggests that the order is to be just as if it were that which it is not; it is to be enforceable just as any other order. If it was an order of the Court as such that was not wanted. The third respect in which the section is otiose is in the second proviso, "that the costs of every proceeding before the Commission shall be in the discretion of the Commission." That was already provided for by s. 19 of the Act of 1888.

If the view which I think is erroneous is accepted the only operative provision in s. 2 is the first proviso which enables the question to be determined in the discretion of the Commission, and with the consent of the parties, by certain two of the Commissioners instead of three. That would have been appropriately expressed as a proviso to s. 1. It would have been necessary only to have s. 1 with the addition to that section of the first proviso in s. 2. The whole of the rest of s. 2 would be unnecessary.

Under these circumstances it seems to me that the true view of the Act is that this matter was determined by the Commissioners under an obligation cast upon them by s. 1, that their power arises in them as contractual arbitrators, and that from them as such arbitrators an appeal does not lie.

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KENNEDY L.J. Upon the question that has been raised, I desire in the first place to say that the contention which formed the main part of the respondents' argument is clearly right: "The creation of a right of appeal is an act which requires legislative authority. Neither the inferior nor the superior tribunal nor both combined can create such a right, it being essentially one of the limitation and of the extension of jurisdiction." That has been well settled, I think, for a very long time, and I take the statement from the head-note of the leading case to which Mr. Danckwerts was kind enough to refer us of *Attorney-General* v. *Sillem*. (1) The question, therefore, so far as that is concerned is whether upon the true construction of the Act of 1909 the tribunal to which this dispute has been referred is a tribunal which in respect of such a dispute is one subject to an appeal to this Court if either of the parties to the reference seek it.

I am clearly of opinion that there is an appeal in this case. The Act itself is one which is not in my view an Act which can be read as a creation of the Legislature ad hoc. It is an Act of general application. As is stated in that which precedes the enacting portion, it is described as "An Act to give further powers to the Railway and Canal Commission to determine differences with respect to telegraphs (including telephones)." It is a piece of general legislation adding one more to the classes of dispute in certain matters which may be referred to a particular legal tribunal. Therefore it is not to my mind an Act which can be regarded as sanctioning and merely sanctioning a contractual or consensual reference to arbitration. And when I look at the last section of the Act itself, leaving s. 3 out of consideration, the Act is one which "may be cited as the Telegraph (Arbitration) Act, 1909, and may be cited with the Telegraph Acts, 1863 to 1908." I will say a word or two with regard to s. 2 later on, but the tribunal to which the reference is made is a tribunal whose decision is by the Act of 1888 subject to appeal upon any question of law.

Stress is laid upon the fact that the word is here "referred" "to the Railway and Canal Commission." I have had the

(1) 10 H. L. C. 704.

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opportunity of carefully perusing the Acts under which that Commission has power to deal with questions submitted to it, and I think I am right in saying that the matters that are to come before that tribunal, by the statute which creates the power to deal with them, are in all cases spoken of as "referred" to the tribunal. It is said that the inference which those who take this objection have asked us to draw is again supported by the fact that it is a reference in a case where the parties have so consented. I desire to point out that in one of the earliest pieces of legislation, before the 1888 Act, namely, the Railway and Canal Traffic Act of 1873, the section which was referred to yesterday, s. 8, says: "Where any difference between railway companies or between canal companies, or between a railway company and a canal company, is, under the provisions of any general or special Act, passed either before or after the passing of this Act, required or authorized to be referred to arbitration, such difference shall at the instance of any company party to the difference and with the consent of the Commissioners be referred to the Commissioners for their decision in lieu of being referred to arbitration." That is a compulsory enactment, but s. 9 is permissive and consensual: "Any difference to which a railway company or canal company is a party may, on the application of the parties to the difference, and with the assent of the Commissioners, be referred to them for their decision." There is a plain enactment requiring that the parties, that is both parties, shall apply for the trial by the Commissioners, and the Commissioners also must assent.

Now, in 1888 that Act of 1873 was in force, but the Legislature drew no distinction between such cases as would fall under s. 8 and such cases as would fall under s. 9. The eighth section of the Railway and Canal Traffic Act, 1888, which Act created in every case a right of appeal, by s. 17, upon law, includes everything in the Act of 1873. Sect. 8 is: "There shall be transferred to and vested in the Commissioners all the jurisdiction and powers which at the commencement of this Act were vested in, or capable of being exercised by the Railway Commissioners, whether under the Regulation of Railways Act, 1873, or any other Act, or otherwise, and any reference to the Railway Commissioners in the Regulation of Railways

Act, 1873, or in any other Act or in any document shall, from and after the commencement of this Act, be construed to refer to the Railway and Canal Commission established by this Act." Every dispute under those Acts that comes before the tribunal which is created by that Act is to be treated so far as the tribunal is concerned as governed by this Act and, therefore, subject to the appeal which that Act by s. 17, sub-s. 2, created.

It seems to me impossible, on consideration of the scheme by which first of all disputes between railway and canal companies are referred, and afterwards such disputes as may arise under the Conveyance of Mails Act, 1893, and in connection with telegraphs, and now in connection with telegraphs plus telephones, to say that those are not all parts of a scheme by which a judicial tribunal is created, subject, in the principal Act which creates it, to an express power of appeal.

Now let us consider for a moment the question as to the second section of the Act of 1909. It may be that that section is otiose or unnecessary except as regards the proviso. I do not profess to have the skill of a parliamentary draftsman, but I can conceive that if the Act had stopped at the end of the first section it might have been said, though I do not think it could effectively be said, that there was a contractual reference to certain named persons as arbitrators. The insertion of the further words is in accordance with the view of parliamentary draftsmen in more than one Act which deals with matters that come before these Commissioners. Sect. 4 of the Conveyance of Mails Act, 1893, is exactly the same, with an inversion of the order of the provisions of s. 2 of the Act of 1909. It is: "Notwithstanding anything in the Railway and Canal Traffic Act, 1888, any matter of difference directed to be determined by the Railway and Canal Commission under this Act may in the discretion of the Commission be heard and determined by the two appointed Commissioners, whose order shall be deemed to be the order of the Commission, and subject to this provision all proceedings relating to any such matter of difference shall be conducted by the Commission in the same manner as any other proceeding is conducted by them under the Railway and Canal Traffic Acts, 1873 and 1888, or any Act amending the

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same, and any order of the Commission upon any such difference shall be enforceable as any other order of the Commission."

Now s. 1 had there in terms stated: "Where under any Act relating to the conveyance of mails or under the Post Office (Parcels) Act, 1882, it is provided that any matter of difference relating to any remuneration or compensation to be paid by the Postmaster-General to any railway company shall be referred to arbitration, that matter of difference shall at the instance of any party thereto be referred to the Railway and Canal Commission" —"referred" I again point out—"instead of to arbitration, and that Commission shall determine the same." Precisely the same argument might have been applied to the unnecessary provisions of s. 4 as are sought to be applied here to s. 2. But it does not stand there. If I look at the various Acts which have added to the original subject-matter of the work of the tribunal, I find that in the Telegraph Act, 1878, which is, I think, the first Act which brings the telegraphs within the ambit of the jurisdiction of the Railway and Canal Commission, in s. 4 the Legislature dealt with differences arising under this Act or the Telegraph Act, 1863, between the Postmaster-General and any body or person having any power, jurisdiction, or control over or relating to a street or public road, and it gave by that section the power for a stipendiary magistrate, a county court judge, or a sheriff to deal with differences which might arise with regard to the user by the telegraph company or the Government of the public street or roads, and deals with them in England, Wales, and Ireland; and there is a proviso that "in case either the Postmaster-General or the body or person between whom the difference has arisen shall be dissatisfied with the award or decision of such magistrate, judge, or sheriff, the party so dissatisfied may within twenty-one days after such award or decision require, by a notice in writing given to the other party, that the difference shall be referred to the Railway Commissioners." It is again "referred." That was in 1878, under the old Commissioners, and not the modern altered body. It might surely be said "that is enough, it is referred to the Railway Commissioners; no need to say any more; it is intended to be a reference of litigation to a tribunal and not a consensual reference to a body of arbitrators." But

the draftsman thought it necessary to say that the course of proceeding should be regulated by the course of proceeding in other matters, and proceeded to say in s. 5: "The differences so required to be referred by the last preceding section to the Railway Commissioners and all other differences under this Act, except a difference between the Postmaster-General and any body or person having any right, power, jurisdiction, or control in, over, or relating to any estuary or branch of the sea or the shore or bed of any tidal water, shall be referred to and shall be determined by the Railway Commissioners for the time being; and every difference referred to them under this Act shall be conducted by the Railway Commissioners in the same manner as any other proceeding is conducted by them under the Acts relating to those Commissioners." In other words it was thought desirable to insert in the Act of 1878 a provision relating to the conduct of procedure, which is similar to that in s. 2 of the Act of 1909, even in respect of a matter which was to be litigated in the strict sense of the term. I do not think that it ought to be considered otiose, because the Act is creating a new jurisdiction with regard to telephones, and it might have been objected, in addition to any question as to s. 1 being construed as a consensual reference to arbitration, that a new subject-matter which had never been introduced before had to be provided for. There was some legislation referring certain telegraph questions to the Railway and Canal Commission; telephones are now being added, and it is desirable to place upon record, in the very body of the legislation which gives the new reference in regard to telephones, that the conduct is to be that which has hitherto been the conduct in all the other matters referred to the body to whom the reference is made.

I am sorry that I have stated my view at such length. I have not personally the slightest difficulty in coming to the conclusion that the clear intent of this Act was to add one more to the subjects of jurisdiction possessed by a Court subject by statute expressly to appeal to this Court.

Objection overruled.

Solicitors: *Solicitor to the Post Office; William E. Hart.*

H. C. R.

END OF VOL. II.